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# Proceedings of the State Bar Association at Its Annual Meeting

C.L Foster

North Dakota State Bar Association

# PROCEEDINGS OF THE STATE BAR ASSOCIATION, AT ITS ANNUAL MEETING HELD AT GRAND FORKS, NORTH DAKOTA. SEPTEMBER 6-7, 1935

## C. L. FOSTER, President, Presiding SEPTEMBER 6, 1935

*Morning Session*

PRESIDENT FOSTER: The meeting will come to order. The first on the program is the invocation by Father O'Meara.

FATHER O'MEARA: In the name of the Father, and Son, and the Holy Ghost, Amen. Oh God, the founder of all law and order, we ask Thee this morning to look with favor upon this gathering of lawyers from all over the State of North Dakota. We ask Thee Almighty to give them grace and strength to fulfill their duties as they should. We ask Thee also to crown the purpose of this meeting with success. We humbly beseech Thee to give them light to perform their duties faithfully and well every day of their lives. We ask Thee as the Founder of all law and order to imbue in their minds and hearts the idea that right is right, if nobody is right, and wrong is wrong, if anybody is wrong. We beseech Thee Almighty God, Father and Son and the Holy Ghost, to bless them now and forever. Amen.

PRESIDENT FOSTER: Thank you. The address of welcome will be given by Henry Owens.

MR. OWENS: Mr. President, members of the North Dakota Bar Association, and distinguished guests:

Important business has called the President of the Board of City Commissioners out of the city, and in his absence, it becomes my duty and my personal privilege to extend to the members of the North Dakota Bar Association a very hearty welcome on behalf of the citizens of Grand Forks.

Our Mayor is a substantial business man and he has written a letter to the local committee in charge of the Bar Association. I don't think that any lawyer could extend a finer welcome than he has embodied in the communication, which he has addressed to Mr. Shaft. It is as follows:

MAYOR'S OFFICE
CITY OF GRAND FORKS
North Dakota

Sept. 6, 1935

Mr. President and Members of the
North Dakota Bar Association:

I regret that I will be unable to be present at your meeting at 10:00 o'clock as I promised Attorney Shaft to give a word of welcome.

However, it is with a great deal of pleasure as Mayor of the City of Grand Forks that I extend a hearty and sincere welcome to the members of the North Dakota Bar Association.

I know of no finer group of citizens who could be gathered from the four corners of our state in a convention of this kind.

In the years that I have been in business I have had occasion to deal with many members of the legal profession and I have come to know and respect the men who are learned in the law and who participate in the development of our great state.

In my business experience and my position as Mayor of the City of Grand Forks, I have learned more of the importance of the work of the lawyers of this state. No words of mine can add to the splendid record of the members of the North Dakota Bar Association in the upbulding of our state and the help that they have rendered to our people during the years of depression.

We are proud of Grand Forks and its institutions. We pride ourserves on our homes, our schools, our churches, our business concerns and the kind of people who make this city their homes. It is with utmost sincerity that I welcome you to the City of Grand Forks, and we trust that your stay here will be both pleasant and profitable. The official family of the City of Grand Forks will consider it their duty, their privilege and their pleasure to be of service to you while you are our guests.

The keys to our city are yours.

E. A. FLADLAND,
President of the City Commission.

PRESIDENT FOSTER: General Hildreth, Vice President of the North Dakota Bar Association, will respond to the address of welcome.

MR. HILDRETH: Mr. Chairman and gentlemen of the Bar:

When I was notified last evening that I was expected to respond to the remarks of the Mayor of the City, who welcomed us here, I was taken completely by surprise; and so I lay awake last night a long time thinking over what I should say on this great and remarkable occasion, with the Bar of the State of North Dakota meeting here in this great city, with its University and its educational facilities, its genuine citizenship, its leaders of the Bar, and of the many distinguished men who have gone out from this city and served their country both in peace and in war. The thought occurred to me, however, that it was wise that the Bar of this State should meet in different cities of the state and bring together the younger members of the Bar, who in the years to come will take the place that some of the older members now fill.

It has been my experience of a great many years, and a fact, that the most interesting part of my long and somewhat turbulent career was to know the fellow that was on the other side of the table, and to get great joy out of the fact that he knew me sometimes, and then on the other hand, to find that he did not know me at all, and I didn't know him; and therefore I come to the conclusion that the happiest moments in the life of members of the Bar are those spent in dealing with the great questions that agitate generally the people of our state and nation. The Bar has always been, and I trust it always will be, the great conservative force in this great country of ours. I don't believe it will ever fail to do its full duty in that behalf. I have therefore great faith in the coming young men of the Bar. I love to talk

with them, tell them of the early days in the territory, in the state, when I came here—very early days, when my friend Tracy Bangs and myself were young men starting out in the practice of our respective professions. He located here and I started in that little city of Fargo. The two cities have always been great friends. Why? Because we always appreciate the generosity of each other, the kindly spirit of citizenship, and their interest to do something for the state.

And now, my friends, I want to say to you that we shall be very good while we are here. We will not cross the raging Red River of the North and get into the wicked City of Minnesota. We will be really good, dispatch our business here, hear some fine talks from distinguished men, and we won't take anything out of the city except the recollection that the people of Grand Forks, and the Bar of Grand Forks represent a fine and splendid resolution of men to do their whole duty, and that we will engrave that upon our memories to last for all time to come.

PRESIDENT FOSTER: General, will you take the chair, please? (Mr. Hildreth takes the chair).

Mr. Chairman, members of the North Dakota Bar Association: Before I start making my so-called talk or speech, I want to express to this Association my feelings of appreciation for having been chosen to serve as your President for the past year. It is quite a job, when you get into it, and it is well worth while. I want to thank every member of the Association for the opportunity of having been able to hold down this job for one year.

I have chosen for the subject of what I am going to say, "The Lawyer's Responsibility."

## PRESIDENT'S ADDRESS

## THE LAWYER'S RESPONSIBILITY

C. L. FOSTER, Bismarck, North Dakota

GENTLEMEN: Law is a public profession, by which, more than by any other profession, the economic life, the government, and even the civilization of this country are modeled.

Let me ask you a simple question. What is the difference between a civilized man and a savage? You will say—a civilized man can read and write; he has books and education; he knows how to make numberless things which make his life comfortable to him. He can get wealth, and build great towns, sink mines, sail the sea in ships, or bring home all its treasures; while the savages remain poor, and naked, and miserable, and ignorant, fixed to the land in which they were born.

True; but we must go a little deeper still. Why does the savage remain poor and wretched, while the civilized people become richer and more prosperous? Why, for instance, do savages never grow more comfortable or wiser—each generation of them remaining just as low as their forefathers were; while we increase in numbers, and in wealth, and in knowledge?

This is the reason. *We have laws and obey them.*. This is the whole secret. This is why civilized nations thrive and prosper.

To our lawyers of yesterday we are largely indebted for what we as a nation are today.

Ours is a lawyer's government. It was the agitation by the patriotic members of the profession which brought on the Revolutionary War. It was the conservative wisdom of Lawyers which framed the Constitution of the United States. Twenty-seven of our presidents have been lawyers. Fifty-four signers of the Declaration of Independence were lawyers. A large majority of the members of both houses of Congress and of the legislatures of the several States have always been, and still are, members of our profession. The checks and safeguards against revolutionary action which distinguish the institutions of the United States from those of all other democracies, are the fruits of the wisdom and foresight of great minds trained to the law.

In "A Glance Behind the Curtain," written in 1843, James Russell Lowell said:

> "New times demand new measures and new men:
> The old advances and in time outgrows
> The laws that in our forefathers' day were best,
> And doubtless after us some purer scheme will be
> Shaped out by wiser men than we,
> Made wiser by the steady growth of truth."

The American Bar Association from year to year increasingly recognizes the truth of that statement and recognizes too that the lawyers of America have a very special *responsibility* in the devising of new measures and the selecting of new men. They, more than anybody else, are in a position to realize when the laws, that in our forefathers' day worked best, have been outgrown in time. Their experience teaches them not to expect of their own or of any other generation final wisdom. The most that we can do is to devote our wisdom to the conditions of our day.

At no time in the recent history of America have reflections of this kind been more pertinent. We are in a larger sense than usual in "new times." We have recently selected "new men," and they are busy with "new measures" to solve unusual problems which the nation has suddenly been called to face.

Every now and then some voice is raised in protest against the prominence of lawyers in our public offairs. If this be an evil, it is wholly inescapable. Having substituted a fixed constitution for the changing will of a monarch, and having determined to protect certain great fundamental principles by writing them down in an authoritative document, we must rely upon lawyers both to make and interpret our laws. In no other way can the guaranties of the Constitution be assured. It is necessary only to mention such names as Oliver Wendell Holmes, Charles E. Hughes, Benjamin N. Cardozo, John W. Davis, Newton D. Baker, Charles C. Burlingham, or a host of others which might be mentioned, all of whom are lawyers, to indicate the extent to which the people look to their lawyers for guidance.

In the light of history, the lawyers of America must realize that they are responsible, first, *as authors of our institutions;* second *as interpreters of them.* and that in consequence, a third great responsibility falls upon their profession *to preserve them.*

It is not uncommon to find public opinion impatient with lawyers and sometimes impatient even with law. Nor is this impatience al-

ways unjustified. But I am persuaded that it is a wrong attitude. A man may have a deep distrust of, or a dislike for, the laws of gravitation, but his sentiments do not protect him from falling when he loses his balance. I am sure that the wiser course is for us all to realize that social order depends upon the making and administering of law, that every act of our lives, in all of our relations to other men and to things, is an item in a great catalogue of legal relations. So far as public opinion is concerned, it will serve itself best by demanding of the lawyers that they do their task well, giving its confidence to lawyers of character.

The lawyer, in the course of the practice of his profession, is consulted by a multitude of people upon a variety of subjects. In this way, he acquires a wide knowledge of conditions and of the problems of the people, as well as a breadth of vision that enables him to give counsel and advice which others lacking his experience and training are unfitted to give. By the type of advice the lawyer gives, he instructs and educates his clients as to the manner in which they should conduct themselves in their public and private relations, and thus exerts an influence upon the community.

Lawyers, by training and by experience, are taught to be deliberative, not to act impulsively, and to consider carefully all sides of a question before they speak or act. They are, in consequence, a steadying force in the community. They oppose snap judgments. They are not overwhelmed by hysteria and they do not jump to conclusions merely because of popular clamor. In great crises, particularly on public or quasi-public questions, lawyers exercise restraint and call for investigation and deliberation, as opposed to hasty and ill-considered action. This, also, is a field in which the lawyer exercises a strong influence upon public opinion.

Modern business has become so gigantic in its scope and so delicate in its operation that the need for trained legal minds at the head even of business enterprises is becoming more and more recognized. Thus we find that in recent years, more than ever before, lawyers are being invited to take leading positions in the business world. We find them at the head of banks, insurance companies and other large financial and commercial institutions. In this capacity, to a large extent, they dictate the policies of industry, its relations with labor and the public and, here again, their influence upon public opinion is far-reaching and their responsibilities profound.

Lawyers are also concerned with the intimate business and family relations and differences of members of the community. They are engaged in the prosecution and representation of men charged with criminal offenses. They stand out as pre-eminent citizens of their communities. That standing is not accidental or fleeting. It is acquired and held because of long years of training and study and a strict regard for the moral standards of the community of which they are a part.

So when you name the leaders of the Bar of any period, you are, in effect, calling the roll of the truly great of the nation. The people have turned intuitively to the members of the legal profession to guide and direct their political, financial and business affairs.

Because the lawyer occupies this prominent position, he naturally has grave responsibilities.

The past thirty years have been without precedent in recorded history. Profound, radical changes have been made in government and society. New economic standards exist. Our method of living is different. Higher education has become general. The means of communication and transportation have brought the people of this country into closer contact. During that time we suffered the shock of the greatest war in modern history. We have witnessed the usual era of legal disrespect to which all wars give birth. The national contacts in every sphere are common affairs of the day. We are in the midst of a financial crisis, from which we hope we are emerging. Because of these happenings, the fundamentals of our legal system have been strained to the limit. It is due solely to the conservatism of our people that thus far we have weathered the storm and now face the future with hope and confidence.

The lawyer lives in the public eye. His duties are essentialy public in their nature. His moral responsibilities, in a pecular manner, are to the Republic and to the State—second only to his God. Primarily, when called to the Bar, the lawyer should have a properly educated and balanced civic conscience, an intimate and complete knowledge of the ethical duties of a lawyer towards the public and towards his client, as well as a due regard for the high moral obligations about to be assumed. This requirement, stressed in this generation and developed because of the peculiar demand for its existence, is founded upon sound public policy. It inures solely to the well-being of society. The law student of today is your judge, your legislator, your diplomat, your president of tomorrow.

To meet the requirements of clients, the lawyer of today must know more law, more business, more politics and more about what is going on in the world than the lawyer ever knew before.

The lawyer is called upon not only to diagnose the difficulties arising in all of the vast fields of human endeavor but to prescribe the remedy for their solution. This is because the lawyer is presumed to have a trained and disciplined mind. He is supposed to be able to reason accurately from premises to conclusions. He views problems objectively rather than subjectively. He solves problems by applying legal principles uninfluenced either by selfish motives, his prejudices or his emotions.

An ethical appreciation of his duties as a lawyer is necessary, but is not the sole excuse for the applicant's presence at the Bar. It is indispensable today that the lawyer be well grounded in those studies which will equip him to participate in the economic and political life of the country, upon an equal basis with those with whom he will come in contact.

At present, indeed for some years past, large numbers of young men have been admitted to the profession without any genuine aptitude for its practice or any genuine consecration to its duties. They fall by the wayside, drift into other and more genial pursuits, and leave sifted out the lawyers who have the natural gifts which the profession demands for its successful pursuit. The cost, direct and indirect, of this method is admittedly large, just as it is in the professions of medicine and theology. But in this field both the Bench and the Bar are cooperating to raise the standards and each year sees more

emphasis put upon character and a heavier demand for preliminary general education as the basis for the admission to a profession which in its nature requires scholarship.

Nor can comparison be made with the preparation of lawyers prominent in other periods of our history. Times have changed. The electrical engineer of today would not be qualified to practice his profession because he was competent to make a good candle. The public would not be satisfied, as it once was, to admit a physician to practice who was able only to successfully bleed his patient. These are the standards of the past. An education, based upon the demands of the future, combined with a definite understanding of the conduct required of him by his profession, as well as a thorough knowledge of the fundamentals of the law, is the least, in the interest of certainty in the administration of justice—the highest aim of civilized man, that can be expected today of the young man seeking admission to the Bar. Even though qualified in these particulars, only a reasonable presumption exists in his favor that experience, based upon a sound foundation, will qualify him to perform properly his professional functions.

The Bar Associations have set these standards with due regard to the dictates of prudence and reason, and its responsibilities to the public. They speak from the experience of years. They seek the cooperation of an enlightened public opinion to assist it in making a learned profession capable of handling the problems the centuries have referred to it and stable enough to meet the demands the future may make upon it.

The Bar has a right as a profession to be proud both of what it is trying to do and of the great amount of the very best conscience and intelligence in the country which the lawyers are devoting to the improvement of the judicial system, without compensation or hope of any other reward than comes from the satisfaction of making the profession a useful public servant.

The practice of the law necessarily involves a combination of the ideal and the intellectual with the practical. The successful lawyer must constantly increase his fund of information on all subjects, that his capacity may be enlarged and his influence broadened. However idealistic or learned the lawyer may become, he will not well serve his client and will accomplish but little if he is not able quickly to apply his fund of information to the practical solution of the problems which are his to solve.

Several years ago that great lawyer and distinguished statesman, Senator Elihu Root, said:

> Not only has the practice of the law become complicated, but the development of the law has become difficult. New conditions of life surround us; capital and labor, machinery and transportation, social and economic questions of the greatest, most vital interest and importance, the effects of taxation, the social structure, justice to the poor and justice to the rich—a vast array of difficult and complicated questions that somebody has got to solve, or we here in this country will suffer as the poor creatures in Russia are suffering because of a violation of economic law, whose decrees are inexorable and cruel. Somebody has got to solve these ques-

tions. How are they to be solved? I am sure we all hope they will be solved by the application to the new conditions of the old principles of justice out of which grew our institutions. But to do that you must have somebody who understands those principles, their history, their reason, their spirit, their capacity for extension, and their right application. Who is to do that? Who but the Bar?

(Chair relinquished by Mr. Hildreth.)

PRESIDENT FOSTER: We have today the Hon. M. C. Fredricks, of Jamestown, who will now address us on the subject of "Forward the Light Brigade." Mr. Fredericks.

MR. FREDERICKS: Mr. Chairman and members of the Bar, ladies and gentlemen:

I believe I don't need to tell you I have been known to talk in public without the aid of a manuscript. I can do that now, but inasmuch as I am going to discuss a subject that is of a great deal of consequence, at least in my estimation, whether or not you fellows believe that I am a great orator, I will stick to the text, and especially in view of that fact that with propriety and purposely, everything that is said here does and should go into a permanent record. I need not repeat the title.

## FORWARD THE LIGHT BRIGADE!

Due to blundering and indifference, on the part of the allied forces, the Russians occupied an alarming and advantageous position at Balaklava. Decisive and heroic action was necessary. The result was the historic and famous Charge of the Light Brigade.

Russianism is again threatening the world. This time, not with armed force, but with a more dangerous weapon—insidious propaganda. As before, there has been blundering and indifference, so that though the allusion of the title which is here selected, be obscure, the analogy is complete. Unless the signs of the times are deceiving, the political storm-center, for the immediate future, will be: the Constitution of the United States. By training and pursuant to their oath to protect and defend it, the Lawyers are best fitted and duty-bound to lead the charge, Therefore:

## "FORWARD THE LIGHT BRIGADE!"

Constitutions are the work of the people, not of legislatures or courts or executives. The people give and the people take away constitutional provisions. This does not mean, however, that the American Constitution may lawfully be crippled or destroyed under the guise of amendment, even by the people themselves. The functions of constitutions are to limit and define the scope and to prescribe the manner of official or public action. Constitutions stamp public officials as functionaries and servants, coupled, however, with an interest, guarded by an oath, and clothed with discretion, and separate their sphere of action into departments. The Constitution is the unquestionable certificate of the supremacy of the collective people in state and nation, and at the same time, it stands as an insurmountable barrier against wild and clamorous encroachments, by the people themselves, upon vested private or public rights. But for the checks and limitations

contained in the Constitution, public officials would soon cease to regard themselves as mere servants, and instead, they would actually become high dignitaries, wielding arbitrary and unchallenged power and authority in regard to things and in places where they ought only to serve and minister.

Limitations in the Constitution were made to accomplish just that object—to curtail and limit. Whenever we are confronted by constitutional obstacles, it is proof that the document has not become obsolete, as is so often claimed as an excuse for ignoring it. The wisdom of the founders of the Government, taught by the experience of the past foresaw that unless both officials and people were restrained by proper constitutional checks, they would likely become arbitrary and oppressive in furthering their own private ends. Destroy the limitations and constitutions lose their usefulness and effect. Whenever a constitutional limitation is torn down the people lose and some official usurps the power formerly withheld, and the toleration of the usurpation serves always as a precedent for further vandalism upon the Constitution.

At no time in the history of the country has there been greater need for patriotic vigilance than now to stem the growing evil of overriding consitutional limitations. Every lawyer, when he is admitted to the Bar, takes an oath that he will support and DEFEND the Constitution of the United States and that of his own state. Do lawyers too, like so many other public officials, regard the promissory oath as a mere perfunctory ceremony, or are we going to be true to that oath? For it really devolves upon the lawyers to defend the country against these insidious domestic dangers.

There is a growing doctrine, seemingly endorsed by the President of the United States, and also by some of his predecessors, "to enlarge the Constitution by judicial construction," or, if that does not work well enough, to roll it down and obliterate it by coercive tactics and forced legislation; defying its limitations, and if neither method is effective then by way of political appeal through demagogic and uninformed and unreasoning radicalism. This pernicious course is sought to be justified by argument that it is too cumbersome and difficult to amend or change the Constitution in the usual recognized way, and that, unless a shorter cut is taken, certain policies cannot be so well carried out, or that political or business interests are likely to suffer under existing conditions. That certain changes in or amendments to the Constitution would be right and proper may be true, but to do so with respect to vital matters, when the mass of the people are in a state of mind which can be best described by calling it a stampede, is neither safe nor patriotic, and further, if it is to be done at all, it should be done only in the constitutional method, and then only with respect to amendable matters.

No one who has any intelligence at all on the subject, asserts, of course, that the Constitution of the United States, or any other Constitution, may not be amended. This would itself be contrary to the provisions of that document, but the right or propriety of amendment must not be confused with destruction or abolition. An amendment, as is well known to lawyers, must always be some matter of detail germain to the original subject-matter, and must not be in conflict with it, and it must not entirely change the original scope and purpose, for,

if it did, it would not be amendment but would be substitution; alike intolerable in legal or parlimentary matters. Any attempt to do so should not be contenanced by those who are oath-bound to defend it.

An example of what is above referred to is: the recent clamor and proposal to amend the Constitution so as to take away, or curtail the power of the Supreme Court of the United States—Nine old men—to declare as invalid or unconstitutional certain legislative or congressional enactments, or executive orders or proclamations. This would not be amendment but would be destructive of the entire governmental system.

Our separate departments of Government, in their adoption, were largely influenced by and patterned after the doctrines of Montesquieu, whose cardinal principle was: that the Executive, Legislative and Judicial departments be kept as separate and distinct as possible; that each be supreme in its own field, and that neither be permitted to encroach upon the prerogatives of the others. If then, we should take away from or materially hamper the Supreme Court in its power and function to determine and declare that either or both of the others have overstepped the limits of their respective jurisdictions, we would not have amended the Constitution, but we would have established a new or different system of Government. This, as already stated, may not be done under the Constitution, but, if done, must be in open defiance of it, and it seems, would amount to revolution if not rebellion. Can such action be expected from those, who only recently, with the greatest of ceremony and display, took and repeated the oath to defend the Constitution without any mental reservation, etc?

Ours is a republican form of Government; composed of three coordinate and independent branches. If we strike down the equilibrium between them we are destroying the whole, and further: we are gaining nothing by the operation, for the power taken away from either one is usurped or appropriated by either or both of the others. Therefore, if the power to properly function be taken away from the judicial department, there is, to that extent, no check or legal restraining power over that usurped or appropriated, and there would be no way by which any highhanded or arbitrary action of such usurping official could be controlled. The part of wisdom should therefore dictate that people be on their guard, and that they be careful how they play with fire or dangerous agencies whose mechanism is not fully understood.

The vice of constitution tampering, however, does not consist in attempting to repeal or amend certain of its provisions, for this, of necessity, draws such prominent attention to the objects and purposes aimed at that any hidden or bad ulterior purpose behind any such proposed change would be quickly detected and "nipped in the bud" but the real purpose usually behind such short-cut method of amendment or change of the Constitution is: to "Slip over some act or measure, under the guise of emergency and a claimed flexibility of the Constitution which could otherwise not be put across."

The present Moratorium proclamations and court decisions dealing with them, as well as certain Federal measures, recently begotten, and still in the process of gestation, are prominent examples of this sort of mutilation of the fundamental law.

The official oath "I solemnly swear that I will support the Consitution of the United States, etc." should be paraphrased for certain high officials whom I could name so as to read something like the following: "I brazenly promise that I will distort the Constitution of the United States, and that I will faithfully listen to and be guided by the political rumblings, and the ravings of mountebanks in the conduct of my office."

It seems as if in response to the tendency of the time many modern officials, and also some courts and judges are bent on bringing about, in spite of the constitutional limitations, just what such men as Madison and his contemporaries feared would be the result, if not properly restrained and safeguarded by constitutional restrictions and limitations.

The Federal constitution is a grant of power. Strict constructionists have always contended that the power conferred by the states and by the people, through the Constitution, upon the Federal Government, is limited to the grant, and the earlier decisions of Chief Justice Marshall, though largely dealing only with cases involving questions, really and properly falling within the police power of the nation, laying down the doctrine of "implied powers," were received with a great deal of misgiving and disapproval. This doctrine is claimed to be invoked, among other instances, in the regulation of the so-called trusts, by Federal authority, by a process of enlargement of the Federal Constitution by judicial construction. This would stretch the clause, under which so much has been held to be authorized—the Interstate commerce clause—out of all shape, and is tantamount to tearing down all the limitations on the power of the Federal Government. Besides, interference with private business, intrastate or interstate, whether carried on by natural persons or corporations, when not infringing either public or private rights, could not rightfullly have been authorized by the Constitution. Anti-trust legislation or worse, trust regulation, as an administrative matter, is extremely near the borderline of another constitutional limitation, viz: that no one shall be deprived of his rights of property without due process of law. Every person, natural or corporate, should have the right to do so as he pleases with his own, provided his actions do not tend to impair any public right or any other person's natural rights. The governmental authority cannot rightfully deter, retard or hamper any private lawful business with statutory prohibitions or restrictive regulations. When any private business ceases to be competitive, and becomes monopolistic, and if the business or commodity monopolized is a public necessity, then, on the theory that government owes to the people the furnishing of public service and necessities at cost, it would perhaps be within the scope of governmental power to take over and itself operate the business so monopolized, or else proceed upon the theory that the person or corporation so operating the monopoly is the delegate of the state in such business, and hence, subject to all such restrictions and regulations as will prevent the realizing of a margin of profit on the same, or otherwise appropriating rights due to the public from government at cost. This would naturally tend to put a stop to private monopolization, for to do so would be but an automatic elimination of the private monopolist from that field, and then, of course, there would be no need for regulation. But to treat a business as private, and then to interfere with its operation by way of governmental regulation, is unjustifiable, either under the

Constitution or on the broad basis of natural justice. Anti-trust statutes have been sustained by the courts, it is true. But these and similar instances and decisions, are only further acts and proofs of lopping off the limitations of the Constitution.

The common public do not usually notice or appreciate the full force of official action or proposal which tends to override a constitutional limitation. Very often the facts and circumstances surrounding such expression or conduct really justify vigorous rebuke, or sometimes the action is a political concession to demagogic or radical clamor of a political party or faction in popular favor, and then no matter how far reaching or vicious in principle the constitutional infraction may be, it is accepted with fulsome acclaim. The potentiality for evil of such action is often not detected nor discovered by any one until long afterwards, when it is pointed to as a precedent or an authority to justify the final destruction of a constitutional limitation, in all probability aimed at all the time.

All legislative power of the Federal Government is vested in Congress, and in addition to the enumerated powers, the Congress is authorized to make all laws which shall be necessary or proper for carrying into execution the powers conferred.

The people as well as the officials become restive under legal restraint when confronted with the existence of abuses. If the proof could be obtained, and the courts fearlessly did their duty under the common law, or by imposing the statutory penalties, these, in many instances, could be restrained and corrected. This being uncertain, the limitations of the Constitution are ignored and radical legislation is demanded to supply what incapable or dishonest officialdom has neglected. As if it would be more effectual, the demand is nearly always made on the Congress of the United States. In cases where the relief demand is of a character, not really within the constitutional power of Congress to grant, especially if the measure demanded can be used to political advantage, like the late N. R. A. the side-stepping begins. If there is no other way open, the interdicted subject-matter is committed to a board or commission, called an administrative body. Such action is sought to be justified under the constitutional provision: that: Congress may make all necessary laws to carry its conferred power into execution. In truth and reality, however, such work is usually nothing but an unauthorized delegation of power. It is not disputed that there are functions which are merely ministerial and administrative, or that these may be properly committed to boards or commissions; there are some things which it would be wholly impracticable for Congress to attend to itself, though it had the power and authority. When such things are performed through the agency of commissions or boards thereunto delegated, acting in a subordinate and advisory capacity, no legal criticism can be made, but when such commissions are clothed with functions and attributes, beyond those possessed by the parent body, the Congress itself, they cease to be advisory and administrative, and become anomalous bodies. When such boards combine the attributes of the three coordinate branches of the Government, and when the result of their operation is sustained and approved by the courts, immediate emergencies may be speedily and advantageously met, yet, in the end it proves to be but a part of the same old process—lopping the limitations, and the remedy is often

worse than the evil or the emergency. The Federal Constitution provides: "That the United States shall guarantee to every state in this union, a republican form of government." Right or wrong, this provision is emphatic in its terms, and until changed in the regular way, should be respected in spirit as well as in letter. Option legislation, on general subjects, or the so called Referendum principle, becoming so common in many states, in tendency, is counter to this limitation. Local option laws with respect to the sale or manufacture of intoxicating liquor, and the like, in particular localities are perhaps distinguishable from laws on other and general subjects for these have been classed as falling within the power exercise of the police power, which, of course, does not depend on constitutional authority, strictly speaking. But the initiative and referendum principle though sustained by the courts, requires a stretching or enlargement of the constitution by judicial construction in order to hold it within the bounds of a republican form of Government.

A republican form of Government is one which is based, primarily upon the doctrine that it is a self-evident truth that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these rights are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers to govern from the consent of the governed, expressed in a written constitution.

A republican form of government does not mean that governments are created for the purpose of bestowing particular blessings or special privileges upon men. It does not mean that it is the prerogative of government or of Governors or public officials to interfere with the lawful liberties of the people, nor that it is a part of their function or duty to foster or promote the private business or enterprise of some of the people. It does not mean that under governmental sanction monopolies may be created or tolerated to interfere with the untrammeled pursuit of happiness by the people collectively or individually. It does not mean that a condition of absolute rule by an individual, such as is now the case in at least one state, may be tolerated. It does not mean that government may be carried on under arbitrary injunctive orders of judges or courts. And it does not mean that the people shall be governed by *Proclamation* of the Executive, state or National; nor does it mean that the land shall be infested with a swarm of tinselled Federal Flunkies, who, on almost any pretext, may intrude their officious noses into every cupboard in the country. It does not mean a Dictatorship; nor does it mean a Bureaucracy. But it does mean a form of government carried on by representatives. It means that it "governs best when it governs least." Its principal function is: "to prevent men from injuring each other, leaving them otherwise free." It means a form of government which is carried on by three coordinate and independent branches; each supreme in its field. It means an AMERICAN government, whose functions and ordinances are followed and loved by a loyal people, while other forms, and other governments are only feared.

The wholesale tearing down and trampling upon constitutional landmarks and limitations has a deteriorating and damaging effect upon the entire population; especially the younger generation.

"Vice is a monster of so frightful mien,
That to be hated needs but to be seen,
Yet, seen too oft, familiar with her face
We first endure, then pity, then embrace."

The most humiliating spectacle is: that so many people seem to be perfectly willing to accept—and who are really expecting to receive—governmental hand-outs, gratuities, dole, protection—direct aid, etc., so utterly inconsistent with the idea of Kingship—Sovereignty.

We boast that in this country, everyone stands proudly erect upon his own feet; refusing to bow the rusty hinges of the knee in supplication for alms; "where each citizen is Sovereign," yet where none wishes to wear the Regal Diadem. But the trend of modern governmental attitude is towards making mendicants of these proud sovereigns—to say nothing of the fallacy involved, for any one knows that government, Municipal, State or National, has nothing which is not first obtained from the people in the form of revenue or taxes.

It is, of course, not implied, that government, with its adhered sovereign power and authority, may not act, and, in emergencies, make loans to the people; but it may not legitimately embark on a policy to finance private business, nor convert itself into a "Foster Parent" of an entire nation; itself the legal progenitor of that government.

The Constitution is not concerned over which political party tenet may be retarded or promoted; neither is the matter of business rehabilitation the all-important question now before this nation, but the really vital question at stake in the United States is: Shall American Sovereign Citizenship be preserved, or shall we follow the path of governmental regulation, governmental centralization and paternalism, until we are swallowed up bait, hook, line and sinker by Communism or Fascism or Naziism? Shall the Chief Executive in state or Nation be a functionary operating under the Constitution or shall he be permitted to assume autocratic and dictatorial power?

Let no one conceive the idea that to obviate the constitutional provisions: that the United States shall guarantee to the states a republican form of government or to construe away the other limitations ordained and established, as a part of that constitution, is to make what is left, more democratic.

This would be a serious mistake. Those who are most active in obliterating and destroying the constitutional limitations, are not interested in the principles of democracy, or, in what is the same thing, the preservation of a republican form of government, except, if possible, utterly to eliminate them. Unthinking theorists may be earnest as well as honest in advocating measures such as the delegation of constitutionally vested power, but such efforts are inconsistent with the spirit as well as the letter of the Constitution, and what there is left of that should be zealously cherished, treasured and defended as the certificate of American liberty, and the stability and safety of our government and free institutions.

All the fine speeches and phrases about coordination, co-operation and youthful progress; and that the magnificence of our modern greatness and speed, has outgrown the narrow confines of constitutional restriction, etc., are apparently nothing more nor less than opiates,

administered so that the major operation of removing the entire insides from the American government—the Constitution—will not be felt or noticed until after we come out of the anaesthesia, if indeed, the patient survives the operation.

We are living in the United States of America. That is to say—in a country composed of a union of forty-eight separate sovereignties. It took a long and sanguineous civil conflict to demonstrate that this union should not be destroyed by the secession route. Shall we now permit its destruction by suffering designing ambition, if no worse influence, to accomplish the same thing by converting the whole into a *unit?*

We must not permit the scrapping of the Constitution. We must not tolerate the abolition of our three coordinate branches of government. We must insist upon the maintenance of a government, republican in form. We must not permit the obliteration of state lines, under the subtle plea of necessity and emergency, nor the destruction of the union of the sovereign states. And we must put a stop to the practice of government by proclamation.

In every critical period in this country, we find the great American Lawyers as distinguished figures in the contest. Let us emulate their example. Beginning with Thomas Jefferson and Alexander and Andrew Hamilton, James Madison and the first Chief Justice, John Jay, John Wythe and James A. Wilson and Patrick Henry, Calhoun, Webster and Clay, Abraham Lincoln and James A. Garfield, and William McKinley, to say nothing of hosts of others, who each in his time, manned the vanguard in the fight for true Americanism and constitutional landmarks and some of them "Foremost fighting fell."

Disciples of Blackstone and Kent and Pomeroy and Marshall and Stoery and Cooley! Back to your oath and back to the Constitution!

FORWARD THE LIGHT BRIGADE:

"Strike till the last armed foe expires,
Strike for your altars and your fires,
Strike for the green graves of your sires
For God and your native Land."

PRESIDENT FOSTER: Sometimes the lawyers become so interested in what appear to be community affairs, that we forget about things in our state that really need attention. A short time ago Judge Nuessle called to my attention a situation in regard to a change in the insanity laws of this state that are somewhat inadequate. There is apparently no provision for certain things in them so I asked Dr. Carr, the head of the State Hospital at Jamestown, to speak to us today on some of the things he thinks important. Dr. Carr, I believe, is one of the outstanding members of his profession, and particularly in his particular field, and I am mighty pleased to present to you Dr. Carr of Jamestown.

DR. CARR: Mr. President, and being an honorary member of your organization, I have the great honor perhaps, and privilege, of saying "Fellow members of the Bar Association"; however, I think I will stick to medicine. When you consider the peculiar nature of the business in which I am engaged, I do not understand what Tracy Bangs

meant when he said, "You will feel perfectly at home when you address us." I haven't any title for the remarks I am about to make concerning the lunacy laws of the state. All I want is your help.

## THE LUNACY LAWS

Before taking up the discussion of the revision of the lunacy laws of the state I want to bring to your attention a matter that has long been under consideration before the various medical assemblies of the state. This is the advisibility of the establishment of a psychopathic hospital as a state institution. While economic factors have deterred the actual promotion of any effort in this direction I am of the opinion that when our state is in a position financially to do so such an institution should come into being. A psychopathic institution would occupy a place midway between the general hospitals of the state and the present state hospital for the insane. In the establishment of such an institution the physicians of the state would then have a place where they could send their nervous and mentally ill patients for observation and care without the necessity of a legal commitment to the state hospital, and thus avoid the stigma that invariably follows the process of declaring a patient insane. Upon being sent to this psychopathic institution by the family physician, the patient would be placed under observation and treatment there, and in a large number of instances recovery would follow in due time and the patient returned to his home. If in the course of the observation and treatment it was found that the case was of a permanent and incurable nature, the transfer to the state hospital could be effected in the usual legal manner. The system now obtaining, that is, waiting until a person shows definite manifestations of a mental breakdown before doing anything about the matter is a violation of scientific and humane principles. Investigation of the case and the application of appropriate means of care and treatment are delayed too long. Early recognition of the coming of mental trouble is necessary in order to enhance the chances for a prompt recovery. The establishment of a psychopathic hospital would attain this end. Proper treatment could be instituted early and no one would be pronounced insane until the case had proven to be incurable. The psychopathic hospital would serve to establish a system under which a mentally ill person could be treated in the early stages of the disorder as a sick and not as an insane person. While progress has been made in breaking down public prejudice concerning abnormal mental states yet the unfortunate notion still obtains. The idea that mental illness is a disgrace and that diseases of the mind cannot be considered in the same light as disabilities of the body is perhaps slowly disappearing, but there is still a long time required to entirely overcome the feeling. However, when and if we have our psychopathic ward, and when physicians in general hospital practice become interested in mental phenomena, and with facilities for the observation and treatment of those who have mental as well as physical problems, the last vestige of public antipathy may be expected to disappear.

While such a hospital would no doubt solve a great majority of the problems which we as psychiatrists are facing, it is perhaps too much to hope for any such consummation in our day and, therefore, it behooves us to take a more practical view of things and treat with conditions as we find them to-day.

As you know each county in our state has its Board of Insanity which consists of an attorney, a physician and the County Judge as Chairman, none of whom have ever had, or claim to have had, any scientific knowledge of mental disorders. Yet these are the gentlemen delegated by law to determine as to whether an individual brought before them is insane. Let me say that in behalf of these county boards of insanity practically all of the cases they declare insane are in some degree mentally deranged. However there is no effort, neither can there be, any effort made by the Insanity Boards to determine as to whether the individual brought before them is suffering with a temporary mental upset, which is not insanity, or whether the condition is one of real, permanent and incurable mental disease, which is insanity. It is not to be expected that the Board could form such an opinion. Consequently, and in any case, the individual is forever marked; he is declared insane and committed to the state hospital. There in your County Court the record remains, the insanity charge is recorded and the stigma is branded upon the individual and his entire family for all time.

Among the changes I beg to suggest in the law concerning committment of patients (2553 of the Compiled Laws of North Dakota, 1913) is a revision whereby a person suffering with a mental derangement can be sent to the State Hospital early, this admission to be accomplished on the recommendation of the family physician to the properly constituted legal authority, and the case sent direct to the hospital without any hearing in insanity before anyone. In this manner the case is sent to the hospital without the stigma of being legally declared insane. Then the officials of the state hospital will have the case under observation and treatment, and if subsequently the case is found to be hopelessly and incurably insane, the Superintendent of the hospital can make application for the legal committment of the case. We should place renewed emphasis on the archaic, inhuman and needlessly expensive procedure attendant upon the admission of such patients to our state hospital. The publicity, and the air of semi-criminality attendant upon a court hearing and method of committment that has remained practically unchanged for a century is distinctly prejudicial to a humane and sympathetic attitude toward those suffering from mental illness, and should be replaced by a more rational, less circuitous and less expensive procedure. Some days ago I received the following letter from an attorney which reflects the public attitude: "Dear Doctor: Several years ago, while I was states attorney of..... County, North Dakota, I prosecuted a case in which.....was convicted of insanity and sentenced to your institution." Why, may we ask, should one be prosecuted for being ill; why convicted of such an offence, and why sentenced to receive care and treatment? If one receives such letters from the educated and professional classes, it certainly must be accepted as a true reflection of the reaction of the general public to the present methods of committment.

Whether the arrangement by which the family physician recommends to the County Judge that the case be sent to Jamestown for observation, or whether some other form for the legal adjudication of the matter would be proper is for you gentlemen of the law to determine. At any rate in whatever form the matter is framed the words sanity and insanity should be entirely eliminated.

It would be futile and perhaps out of place for me to attempt a thorough review of the causes that have resulted in the wide spread of insanity throughout the country. Of all the causes that have contributed to this increase of late years the stress and strain of modern living, the economic cataclysm and the precipitous strife for place and financial security, with the attendant disappointments and failures are perhaps the leading factors in the growing numbers of those affected by the tincture of lunacy.

Writers on medical jurisprudence have defined the various phases of a diseased mind under the heads of insanity, mental derangement, dementia, imbecility, etc., but these terms simply describe a sliding scale of mental disorder or enfeeblement, expressing different degrees of deterioration, and are subject, therefore, to whatever interpretation the mind of the observer may choose to give them. It has been impossible to find any single test of mental disorder, notwithstanding the persistent efforts of the courts to adopt certain criteria from time to time, which may have given way to other standards equally unreliable. Insanity is a disease or rather a class of diseases, of such variable phases that no symptom, or group of symptoms, is of sufficient diagnostic value to establish its existence. Consequently, testamentary capacity, when the question of insanity is raised, should be determined by the evidence deduced in each particular case. Any simple standard by whose imperfect gauge a judge may seek to measure the intelligence of men is most imperious.

Dr. William A. White in a recent address before the American Bar Association formulated some very constructive ideas concerning the relation of insanity, courts and crime. He believes that the methods of legal procedure of the present day are based upon concepts which are largely obselete, and that penal methods as they exist at present are quite inadequate to deal with human behavior; that the law emphasizes too greatly the act and too little the individual. The evolution of legal procedure has been based essentially upon precepts and many of the ideas incorporated in it are many centuries old. Modern psychiatry is a relatively new science, although mental disease and defect have been present longer than the law. Many of the concepts of law originated centuries ago in the desire for vengeance against the offender and that punishment which the law imposes is a response to this desire. May I not make a plea for the union of effort between the psychiatrist and the lawyer instead of the present antagonism of different ideas and concepts? To further this end let me formulate a few suggestions, namely: First. To do away with fixed prison sentences for certain types of crime and make the return of the prisoner to freedom conditional upon some change in him that warrants the assumption that he may function more effectively in the future than he did in the past. Second. The elimination of punishment as a vengeance motive. Third. The gradual transformation of prisons into laboratories for the study of the individual and of behavior instead of being depositories for those who have committed anti-social acts. Fourth. The discarding of the concept of responsibility.

It is quite obvious that there is no specific formula which can be adopted that will make any sudden and appreciable difference in the incidence of crime. Experience has shown that about 20% of all criminals are feeble minded to a greater or less degree, and that about 10%

are of the "born criminal" class. The remainder of the great army that come in conflict with the law are those who have done so through force of circumstance, especially as regards a vicious early environment. It is with this group that prophylactic treatment may be of value. Experience has proven that it is distinctly advisable to separate the juvenile court from the adult courts. Those courts that have had psychiatrists, social workers and well trained probation officers as adjuncts have been able to achieve the best results, as is noted in the experience of the Boston court. By the same token, psychiatric and psychological examinations of all prisoners accused of felonies should be made before the prisoner has his trial so that the judge may have a knowledge concerning the personality of the criminal as an individual as well as an understanding of the act that he committed. The present system of prosecution and defense in criminal cases employing different groups of psychiatrists for the setting forth of their opinions has given rise to the so called "battle of the experts" which has been condemned by all thinking men the world over and has given the medical profession a degree of censure that it does not deserve. A great deal of this confusion that is brought into sensational cases could be averted if the mental status of the prisoner be determined by a group of psychiatrists appointed by the court and not by either the prosecution or the defense. The ability of the average jury to understand the intricacies and discussion of the psychiatric condition of a prisoner is limited, and because of this ineptitude of the jury they most frequently return a verdict at variance from the testimony and concepts that had been propounded by the psychiatrists.

The great profession of the law is a noble one, but it has not changed in its precepts or ideas in some instances for many generations. The same situation may be said to have existed as regards the science of psychiatry for many years, but within the past 20 years there has been a great change in the attitude of medicine toward its growing relative—psychiatry. It is the hope of the medical profession that by a union with the legal profession, and a more harmonious cooperation between the two, much may be done in diminishing the incidence of crime, and that a better understanding of the psychology of the prisoner as a person will be established.

PRESIDENT FOSTER: Doctor Carr, on behalf of the Association, we wish to thank you for your very splendid address.

At this time, I believe a motion would be in order to the effect, if the Bar thinks so, that the Legislative Committee to be appointed for the next year or two years, be instructed to cooperate with Dr. Carr with a view of preparing such legislation as may be necessary for presentation to the next Legislature.

MR. ELLSWORTH: I make that motion. (The motion duly submitted, seconded and unanimously carried.)

PRESIDENT FOSTER: I understand that there is a meeting of the First District Bar Association, following the morning session.

It is now just twenty-three minutes of twelve. We have left only a short report of the Executive Committee, and the report of the Secretary-Treasurer, Mr. Tillotson.

SECRETARY TILLOTSON: Mr. President and members of the Bar:

As ex-officio secretary of the executive committee, I will submit a very brief report of the activities of the committee during the past year.

## REPORT OF EXECUTIVE COMMITTEE

A special meeting of your committee was held at Bismarck on October 25th, 1934. At that meeting Grand Forks was designated to entertain the 1935 Annual Meeting of the Association and the President and Secretary instructed to arrange the date of meeting. A budget for 1934-1935 was drawn up and approved. Members of the Association were selected as candidates for election to the Bar Board. The President submitted names of members to be appointed on standing committees, and the Executive Committee approved the same. Miss Catherine M. Coleman, formerly of Dickinson and now of Helena, Montana, was elected an honorary member of the Association.

A proposal for a more effective Bar organization in this state, prepared by Secretary Wenzel, was read and spread upon the minutes, and on motion, referred to the Local Organizations Committee. This plan will be published in the Annual Number of Bar Briefs and in that way brought to the attention of the Association for future action. Secretary Wenzel's resignation was accepted and B. F. Tillotson was appointed to fill his unexpired term.

At a meeting at Grand Forks on September 5th, 1935, routine business was transacted including audit and approval of the financial report of the Secretary-Treasurer for 1934-1935; and approval of certain expenditures, including the amount expended on the responsibility of some of the officers of the Association for the publication of certain emergency measures adopted by the Legislative Session of 1935.

## R. E. WENZEL'S PROPOSAL FOR A MORE EFFECTIVE BAR ORGANIZATION FOR NORTH DAKOTA

1. Districts as now constituted shall control, and be entitled to the following representation in all voting on questions coming before the annual meeting:

First District—6 Votes

| County | Lawyers |
|---|---|
| Barnes | 13 |
| Cass | 58 |
| Grand Forks | 42 |
| Griggs | 4 |
| Steele | 4 |
| Traill | 7 |
| | 128 |

Southwestern District—3 Votes

| | |
|---|---|
| Adams | 7 |
| Bowman | 4 |
| Dunn | 2 |
| Golden Valley | 3 |
| Grant | 4 |
| Hettinger | 6 |
| McKenzie | 3 |
| Mercer | 5 |
| Morton | 13 |
| Oliver | 2 |
| Sioux | 2 |
| Slope | 2 |
| Stark | 15 |
| | 68 |

Northwestern District—4 Votes

| | |
|---|---|
| Burke | 4 |
| Divide | 5 |
| McHenry | 5 |
| Mountrail | 6 |
| Renville | 4 |
| Ward | 38 |
| Williams | 10 |
| | 72 |

Capital District—4 Votes

| | |
|---|---|
| Burleigh | 30 |
| Eddy | 6 |
| Foster | 5 |
| Kidder | 4 |
| McLean | 7 |
| Sheridan | 4 |
| Stutsman | 13 |
| Wells | 10 |
| | 79 |

Lake Region District—3 Votes

| | |
|---|---|
| Benson | 5 |
| Bottineau | 8 |
| Cavalier | 3 |
| Nelson | 5 |
| Pembina | 7 |
| Pierce | 4 |
| Ramsey | 14 |
| Rolette | 2 |
| Towner | 4 |
| Walsh | 11 |
| | 63 |

Southeastern District—3 Votes

| | |
|---|---|
| Dickey | 7 |
| Emmons | 7 |
| LaMoure | 6 |
| Logan | 4 |
| McIntosh | 5 |
| Ransom | 9 |
| Richland | 15 |
| Sargent | 6 |
| | 59 |

2. The representation here specified is based upon the 1933 Attorney's List as published by the State Bar Board, and contemplates one vote for every 20 lawyers or a majority of that number, where the division is not otherwise equalized.

3. Every standing committee of the State Bar Association shall file its report with the Secretary of the State Bar Association on or before the 1st day of June of each year. Such report shall then be published in the June issue of Bar Briefs, and be considered and acted upon by the several district associations in July.

4. Any report not so filed on or before the 1st day of June shall not be considered at the annual meeting, without the unanimous consent of such meeting.

5. In case any district association fails to hold a regular meeting during the month of July, or fails to vote upon State Association matters submitted to it, it shall be entitled to only 1 vote for each 20 members attending the State Bar meeting.

6. Every district association shall hold at least one meeting each year; and if only one meeting is held the same shall be held in July, at which time, in addition to the consideration of State Bar matters, it shall elect its officers for the year. In case of failure to hold such election, the officers then in charge shall hold over for one year.

7. Every district association shall, at the meeting in July, select one representative on the nominating committee of the Association. The representatives of the various districts shall, on or before the first day of the annual meeting of the State Association, in session or by correspondence, select a slate of candidates for the State Bar Association, consisting of at least one and not more than three names for each office.

8. It shall be the duty of the Secretary of the State Bar Association to ascertain, from the records of the State Bar Board, on the first day of June of each year, the number of lawyers duly licensed for the year, and shall immediately report to the President of each district association the number of votes to which such district association is entitled on the basis of one vote for each twenty lawyers licensed, as more fully set forth in paragraph 2 hereof.

9. As soon as conveniently may be, after the completion of the referendum for the selection of lawyers to be recommended to the Supreme Court for election to the Bar Board for the term of the member retiring in January, 1935, the following procedure shall be adopted to govern in the future: The two men receiving the largest number of votes, aside from the one selected by the Supreme Court, shall remain on the list of the State Bar Association for future consideration by the Court. A referendum shall then be held upon a ballot consisting of one name from each of the districts, and the person receiving the highest number of votes shall be added to the list of two theretofore selected, and those three shall constitute the recommendation of the Bar Association in any case of emergency. Whenever such list of names shall fall below three, by reason of the death, resignation or removal from the State of one or more persons on such list, the State Bar Association shall, as soon as conveniently may be, offer a ballot, consisting of one name from each of said districts, and the person or persons receiving the highest number of votes on such ballot shall be deemed the endorsee or endorsees of the State Bar Association to complete such list, it being the intent and purpose hereof to have constantly available three recommendations for appointment to the State Bar Board by the Supreme Court.

## REPORT OF SECRETARY-TREASURER

Former Secretary-Treasurer R. E. Wenzel removed from the state to Chicago in September, or early October, 1934. The present Secretary-Treasurer was appointed October 25th and, not having the

opportunity to confer with Mr. Wenzel, was obliged to undertake the duties of the office without any clear idea of what those duties were, and to proceed more or less by trial and error. Confronted with a budget system, I was inclined to be conservative in the matter of expenditures, as will appear from the financial statement appended hereto. As to nearly every item the disbursements during the period of 1934-1935 were less than the budget allowance. I also had in mind the fact that the number of licensed members of the bar, and consequently the income of the Association, showed a marked decrease during the period in question. Economy in the administration of the affairs of an organization such as this is not necessarily a matter for congratulation, since it may indicate a falling off in the activities which are the purpose and objective of the Association. For instance, the Committee on Citizenship and the Committee on Press and Public Information did not spend any of the amount allowed them, which indicates either a lack of activity on the part of those committees or, more likely, that the members functioned at their own expense.

In one respect the budget was exceeded; that is, by the publication of certain of the acts of the 1935 Legislature which carried emergency clauses. These acts, selected as being of particular and pressing interest to members of the Bar were sent out in printed form to every active practitioner, the expense being undertaken on the responsibility of the President and the Secretary of the Association. The expense was $132.00. Of this we received, by way of contributions from the members, the sum of $37.10 in cash and $2.00 in stamps. A list of the contributors is appended to this report and will be published in the Annual Number of Bar Briefs.

The role of editor was a new one to me. I appreciate that the publication belongs to the members of the Bar, and I feel that while an editor and business manager is a necessary evil, some steps should be taken to make it more definitely a State Bar Association organ. With this in view I recommend that the Association consider the desirability of appointing a board of editors who shall assume the responsibility of selecting or furnishing the material or copy for each issue of the publication, leaving the business management and clerical and mechanical work to the Secretary. Because of the limited space in Bar Briefs as it is generally published it would seem that, if the suggestion just made should be adopted, it might be well to make the publication a quarterly rather than a monthly magazine. I believe that the recommendation here made might be carried out by a resolution of this Association, vesting the power of appointment of the board of editors in the President or the Executive Committee.

Some suggestions have been received with reference to the advisability of including some advertising matter in Bar Briefs. The fact is that under the postal regulations it is not practicable to accept advertisements, since it would result in increased postal rates and necessitates some kind of a zoning system in the mailing list.

A very considerable part of the mailing list of Bar Briefs consists of exchanges with law and college libraries and law organization publications. Requests have been received from all parts of the United States for back copies of the publication, indicating a considerable interest in this publication. It has not been our practice to limit the mailing list to attorneys of the state who have obtained their current Bar

Board licenses. We have felt that it should be sent wherever it might be of some use, or to anyone who might be interested in its contents.

Finally I want to remind the members of the Association, with reference to my efforts to perform the duties of Secretary-Treasurer-Editor, of the old, old story of the sign which hung over the piano in a mining camp dance-hall, which read: "Don't shoot the pianist; he's doing the best he can."

## SECRETARY-TREASURER'S FINANCIAL STATEMENT FOR 1935

| | | |
|---|---|---|
| Balance Last Annual Meeting | | $1,625.51 |
| Received for Banquet Tickets | | 194.00 |
| | | $1,819.51 |
| Balance 1933-34 Account: | | |
| 1934 Meeting | $575.08 | |
| Executive Committee | 75.70 | |
| President | 67.88 | |
| | | $ 718.66 |
| Balance for New Administration | | $1,100.85 |
| Received from Bar Board | | $1,920.00 |
| Received, Contributed for Printing of Emergency Legislation, cash | | 37.10 |
| Received, refund from 1934 Committee on Ethics and Internal Affairs | | 3.00 |
| | | $3,060.95 |

*Expenditures*

| | Budget | Expended |
|---|---|---|
| Bar Briefs | $ 325.00 | $ 268.81 |
| Bar Briefs, December 1934 | 425.00 | 332.71 |
| Executive Committee | 250.00 | 68.61 |
| President | 200.00 | |
| Postage and Printing | 150.00 | 36.12 |
| Secretary-Treasurer-Editor | 720.00 | 720.00 |
| 1935 Annual Meeting, including Reporter fee | 600.00 | 3.48 |
| Bar Board Referendum | 75.00 | 43.58 |
| Citizenship Committee | 75.00 | |
| Miscellaneous | 100.00 | 25.30 |
| Press and Public Information | 50.00 | |
| Publication of Emergency Legislation | | 132.00 |
| | $2,970.00 | $1,630.61 |
| Balance | | $1,430.34 |

The undersigned Auditing Committee hereby find the above and following report true and correct.

M. L. McBride,
John B. Layne,
John A. Stormon.
Auditing Committee.

B. F. Tillotson, Secretary-Treasurer,

State Bar Association of North Dakota,

Bismarck, N. Dak.

Dear Sir:

The records of the State Auditor show that during the period September 1st, 1934, to Sept. 1, 1935, there was paid from the State Bar Fund to the State Bar Association the sum of One Thousand Nine Hundred and Twenty Dollars ($1,920.00).

BERTA E. BAKER, *State Auditor.*
By J. O. LYNGSTAD, *Deputy.*

This is to certify that the balance on deposit to the credit of State Bar Association of North Dakota in Dakota National Bank & Trust Company, at close of business, September 4th, 1935, is the sum of $1,430.44.

DAKOTA NATIONAL BANK & TRUST COMPANY,
By H. E. BAKER, *Asst. Cashier.*

I, J. H. Newton, Secretary-Treasurer of the State Bar Board of the State of North Dakota do hereby certify that between September 1st, 1934, and September 4th, 1935, I approved vouchers and turned over warrants to the State Bar Association as their pro rata share of annual license fees paid, in the aggregate sum of $1,920.00.

J. H. NEWTON
*Secretary-Treasurer, State Bar Board.*

| | |
|---|---|
| The State Bar Board has collected, and holds for the account of the State Bar Association, fees amounting to .. | $ 960.00 |
| This amount, added to the balance appearing above leaves a total of | 2,390.34 |
| Estimated expenses of 1935 Annual Meeting and other items are | 765.00 |
| Leaving a probable or estimated amount for the coming administration | 1,625.34 |

B. F. TILLOTSON,
*Secretary-Treasurer.*

## CONTRIBUTORS TO EXPENSE OF PRINTING EMERGENCY LEGISLATION

| | |
|---|---|
| Carl Aurland, Minot | $ .50 |
| P. C. Arildson, Schafer | .50 |
| John B. Adams, Lisbon | .50 |
| A. W. Aylmer and John Kjellum, Jamestown | .50 |
| W. H. Adams, Bottineau | .50 |
| C. O. Aaker, Minot | .50 |
| N. J. Bothne, New Rockford | .50 |
| Edwin E. Bothne, Jamestown | .50 |
| R. H. Bosard, Minot | 1.00 |
| R. A. H. Brandt, Minot | .50 |
| Conmy & Conmy, Fargo | .50 |

| | |
|---|---|
| J. L. Cashel, Jr. | .50 |
| Chas. Coventry, Linton | .55 |
| Carroll E. Day, Grand Forks | .50 |
| DePuy & DePuy, Grafton | .50 |
| R. L. Fraser, Garrison | .50 |
| Jos. J. Funke, Minot | .50 |
| Forbes & Forbes, Wahpeton | .50 |
| Hyland & Foster, Bismarck | .50 |
| Houska & Stevens, Cando | .50 |
| Fred M. Hector, Fargo | .50 |
| Fred E. Harris, Rolla | .50 |
| E. M. Hendricks, Bismarck | .50 |
| Thos. G. Johnson, Hillsboro | .50 |
| John Knauf, Jamestown | .50 |
| Arthur Knauf, Jamestown | .50 |
| Kvello & Adams, Lisbon | .50 |
| Bernard Kelber, Ashley | .50 |
| C. J. Kachelhoffer, Wahpeton | .50 |
| John H. Kirk, Bottineau | .50 |
| F. B. Lambert, Minot | .50 |
| L. C. Lindeman, Minot | .50 |
| W. J. Lorshbough, Fargo | .50 |
| Lemke & Weaver, Fargo | .50 |
| Lewis & Bach, Minot | .50 |
| Albert Lundberg, Grafton | .50 |
| F. A. Leonard, Fargo | .50 |
| Chas. Lyche, Grand Forks | .50 |
| McIntyre, Burtness & Shaft, Grand Forks | .50 |
| William Murray, Minot | .50 |
| T. W. Morrissey, Edmore | .50 |
| John Moses, Hazen | .50 |
| C. J. Mead, Lisbon | .50 |
| J. S. Moothart, Cando | .50 |
| Ivan W. Metzger, Williston | .50 |
| I. A. Mackoff, Ashley | .50 |
| C. J. Murphy, Grand Forks | 3.00 |
| Nestos & Herigstad, Minot | .50 |
| L. R. Nostdal, Rugby | .50 |
| Nilles, Oehlert & Niles, Fargo | .50 |
| O'Keefe & Peterson, Grand Forks | .50 |
| O'Hare, Cox & Cox, Bismarck | .50 |
| A. G. Porter, LaMoure | .50 |
| R. H. Points, Crosby | .50 |
| L. J. Palda, Minot | .50 |
| C. E. Peterson, Valley City | .50 |
| Pierce, Tenneson, Cupler & Stambaugh, Fargo | 1.00 |
| Robert W. Palda, Minot | .50 |
| Samuel J. Radcliffe, Grand Forks | .50 |
| Senn & Jongewaard, Rugby | .50 |
| Soule & Pierce, Fargo | .50 |
| J. W. Sturgeon, Dickinson | .50 |
| Frank E. Shaw, Sheldon | .50 |
| Franz Shubeck, Ashley | .50 |
| Emanuel Sgutt, Fargo | .50 |

O. M. Thoreson, Lakota ..... .55
Traynor & Traynor, Devils Lake ..... 1.00
J. A. Walsh, Larimore ..... .50
Albert Weber, Towner ..... .50

PRESIDENT FOSTER: Do you move the adoption of your report?

SECRETARY TILLOTSON: I so move.

MR. HILDRETH: Second the motion.

(The motion was duly submitted and unanimously carried).

PRESIDENT FOSTER: Does any one wish to move the consideration of Mr. Tillotson's proposition on changing the plan of Bar Briefs, or do you want to discuss that later?

MR. ELLSWORTH: I don't believe that that comes up now. It is a proposition which comes up before the Committee on Constitution and By-Laws.

PRESIDENT FOSTER: I based that suggestion on the statement made by Ben. I assumed he studied the by-laws and he said in his opinion it was not necessary. That is all I know about it. We will define it that way.

SECRETARY TILLOTSON: There is such a proposal mentioned in the Report of the Committee on Constitution and By-Laws.

PRESIDENT FOSTER: If that is the case, we will defer it until that is heard.

I have here a telegram from A. G. Divet, from Los Angeles:

"Just a friendly greeting. May your meeting be a success and all return to your work relaxed, invigorated and happy. I had planned to be with you for one day but unforseen occurrences prevent."

If there is some member of the Junior Bar here, I have a letter from the Chairman of the Junior Bar Committee who was appointed. Is there one of you here? I would like to give you this letter.

It is now five minutes to twelve and I believe a motion to adjourn until two o'clock is in order.

The President of the University would like to have it announced here that the University is closing courses for some of the students at the present time. If any of you have room going out he will appreciate if you will arrange to take some of the boys home. I presume they are pretty hard up and would appreciate getting a ride back if any of you have any room.

MR. OWEN: If any of the members of the Bar happen to get tagged for parking over time, or a violation of that kind, if you will bring the tag directly to the secretary, I will look after that matter, and then this afternoon I will have some guest tags.

MR. BANGS: In order that I may make a motion that will be sure to carry, I move that we recess.

The motion was duly seconded and carried.

*Afternoon Session*

PRESIDENT FOSTER: This morning some of the members complained that they were unable to hear in the back of the room. I want to call your attention to the fact that there are about as many unfilled seats in the front as there are in the back end, so if you can't hear this afternoon, it is your own fault. Won't you move up toward the front of the room, as this room is not very good on sound facilities.

I have an announcement to make. The alumni of the University of Michigan will have their luncheon tomorrow noon at the Frederick Hotel. Those interested should leave their names at the Registration Desk at the lobby of this hotel during this afternoon. The price of the luncheon will be thirty-five cents.

There is also another announcement. The First District Bar Association meeting, which was announced to take place right after the session this morning has kind of fallen through. They now ask that it be announced here that the First District Bar Association will meet here immediately following this afternoon session.

A number of years ago when I was trying to study law in St. Paul, I knew by sight a rather tall slim young man who had been at that time just admitted to practice law. He did not know me but I used to meet him around the corridors of what was then the Germania Life Building. He was always very pleasant and never failed to speak to a kid he saw around there, although he didn't know who he was. This year it came to me that that fellow would be a good man to come out and make a speech to this Bar Association, so we have been very fortunate, I believe, in securing the Honorable Bruce Sanborn of St. Paul to speak to us this afternoon. I have forgotten the title of his speech but he will tell you. It is a great pleasure to me to introduce Bruce Sanborn of St. Paul.

MR. SANBORN: Mr. President and members of the Association, fellow lawyers:

In the accounts of the witticisms which were published following the death of America's beloved humorist, the late Will Rogers, I came across a story which described his attendance at the London Naval Conference in 1930. Said the quaint and versatile American, "I stood through one speech, sat through eight, and slept through twelve, and after three solid hours of conference, now a row boat is sunk." As to this, I ask only that you do not stand.

When I received a gracious invitation from your President to address you at this convention, I did not take long in accepting it. I feel quite at home in North Dakota. As I was telling the Traffic Club this noon, I filed on a homestead north of Williston over thirty years ago. Later I thought of trying to establish myself in the practice of law here and came out to Minot with that purpose in view. Later still, thinking to find a safe investment for my little savings, I purchased some North Dakota land. In the last few years, I have begun to suspect that I invested it so securely that I might have trouble in getting it out.

When I heard that your sessions were to be in Grand Forks, I hoped I would have at least one friend in the audience, for I have come in

close association with Harris A. Bronson in his capacity as Chairman of the Committee on Public Information of the National Conference on Uniform Laws and Organization. He has served with great ability. It is also a pleasure to see here this afternoon another able committeeman, Clyde Young. However, we shall put these personal considerations aside, while I speak to you on the subject of "Diffusion of Governmental Powers."

## DIFFUSION OF GOVERNMENTAL POWERS

When the gracious invitation came from your President to address you during these sessions, it occurred to me that no more suitable month could be chosen for such an address as I should plan to make as the present one, for it was on the 17th of September 148 years ago that the drafting of our Constitution was completed by its framers. That, as you well know, was at Philadelphia, then a city about twice the present size of Grand Forks. At the conclusion of the deliberations of the Constitutional Convention, which had lasted throughout the summer and over a period of four months, and on the date above referred to, the thirty-nine signers of the Constitution approached the table to sign their names. All the experience of past ages and all forms of government had been carefully considered and debated. And it is an interesting commentary that the work of these founding fathers, George Washington as presiding officer, Benjamin Franklin, filled with years and honors and the then chief executive of Pennsylvania, Alexander Hamilton, James Madison, Roger Sherman, among other great figures in that galaxy of notables, should have embodied in less than 4,000 words this "most wonderful work ever struck off at a given time by the brain and purpose of man," as Gladstone characterized it. That was a tribute to the fine self-restraint of the men who expressed their conclusions in it. And is it not probable that we owe the elasticity of that document, which has been found so adaptable to the "ever-accelerating changes of the most progressive age in history," to the terseness of its language and the simplicity and directness of its design. As has been said by that brilliant exponent of the Constitution, our former Solicitor General James N. Beck, "it was wise in what it provided and wise to the point of inspiration in that which was left unprovided."

Ten years ago our now Chief Justice Hughes was President of the American Bar Association. During his term in that office he had led an historic pilgrimage of American lawyers to the shrine of the common law, and in London had spoken with great eloquence, as perhaps some of you will recall, at Westminister, the Hall of William Rufus. There he gave expression anew to our allegiance and faith in the great principles of the common law, from the underlying spirit of which and the spirit of the Anglo-Saxon race our Constitution was taken. At the conclusion of his term as President of the Association and in his annual address on "Liberty and Law," I recall some sentiments voiced by him which struck me forcibly, and which are interesting to recall at this present juncture. The now Chief Justice spoke of the design of the Constitution "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, and promote the general welfare" with the ultimate aim of securing to us and our posterity the blessings of liberty, and said: "We are admonished, as we consider the times, that we must take

fresh hold of these principles, treasure our privilege to declare them, extricate them from the confusion of controversies, make them plain to the well meaning and zealous citizens who in the pursuit of aims believed to be worthy may be unmindful of them."

It is my purpose to refer, I trust at no wearisome length, to two basic principles of our form of government, away from which, it seems plain, we have dangerously veered. Then I wish to refer to some limitations on the power of the judiciary in its effort to hold the scales of justice in equipoise.

The separation of the powers of government is a basic principle embodied in our Constitution. There is a need for keeping them separate. That is the principle advocated so brilliantly by that philosophic historian Montesquieu, of whose works many of the framers of our Constitution were careful students. It was the view of that talented Frenchman that the union of legislative, executive, and judicial powers in any one man or body of men could only mean tyranny, and that in their separation lay the good fortune and safety of the state. That theory and belief was held by the framers of our Constitution.

The virtual abdication by Congress of some of its rights and prerogatives is fresh in the minds of all of us. To the extent that Congress does abdicate, our system of checks and balances is destroyed, by this subordination of the legislative to the executive power. The joining in one branch of the government of the power to execute, to legislate, to pass judgment, violates the plain language of the Constitution.

It is no new theory or conclusion that the members of Congress, as the servants of the people, alone should make laws for the people. It is a subject over which at least two wars were fought. Perhaps the classic illustration of the attempt by Congress to abrogate its own power and surrender it to the Executive is to be found in the National Industrial Recovery law. The Act gave unprecedented power to make rules and regulations having the force of law. It not only tended to project control from Washington into the far corners of the nation and into practically all industry, but, in the original act, authorized the President to establish such agencies and appoint such officers as he should find essential, to designate their duties, to fix their salaries; jail sentences and fines held a threat over the non-complying individual or business. Under this unusual legislation the Executive Department promulgated over 5,000 laws, the violation of which would constitute crimes, and over 17,000 rules and regulations. Our citizens have been charged with the violation of laws of which they knew nothing and concerning which it was found difficult, not infrequently, to be fully informed. Is it going too far to say that our citizenry were subjected to a form of inquisition and surveillance that was contrary to the American spirit, however well intended the legislation may have been? Thomas Jefferson once said:

> "Our Constitution has accordingly fixed the limits to which, and no further, our confidence may go. In questions of power then, let no more he heard of confidence in man, but bind him down from mischief by the chains of the Constitution."

And if one branch of the government should have more powers than the express powers granted it, it is for the people, in whom the power resides, to grant the power. It is not for our representatives in the exercise of delegated powers only, to change the Constitution by obscure means. That seemed clear, and has been made made more plain in the past months. As is said in the Schechter case:

> "The Congress is not permitted * * * to transfer to others the essential legislative functions with which it is thus vested";

and in the Humphreys case, decided on the same day:

> "The sound application of a principle which makes one master in his own house precludes him from imposing his control in the house of another who is master there."

It has proved not too difficult, although it takes time, to amend the Constitution. We have our twenty-one amendments. There have been two amendments adopted quite recently, the lame duck amendment, so-called, fixing the time of the commencement of the terms of the President, the Vice President, and the members of Congress, and fixing the time of the assembling of Congress; also the amendment which repeals the 18th amendment. Surely if the Executive is to have the power to make laws, the result should come about by an open proposal for amendment of the Constitution.

The other basic principle to which I shall refer is that unique contribution to the science of government made by the framers of our Constitution, that of a divided sovereignity, of a dual citizenship. It was a simple principle, yet complex, and was first embodied in our Constitution. There was novelty in the thought of a dual allegiance by the citizen, on the one hand to the Nation, on the other hand to the State, to each in its respective spheres of government. You will recall that Thomas Jefferson wanted a strict construction of the Constitution, and was greatly concerned lest the people should become subjects of a centralized power. We may wonder what he would think if he were on earth today and could have seen the tendency to centralization, which has been so gradual as almost to escape effective challenge.

It must be recognized that there are certain physical factors which have tended toward centralization and against which it has seemed difficult to cope. There are other tendencies with which we should actively cope. When the Constitution was put into effect and that genial philosopher Franklin made his famous remark: "Everything appears to promise it will last, but in this world nothing is certain but death and taxes," the population of our country was more than 50% agricultural, whereas today it is less than 15% so, and our chief population is centered in the great industrial cities. The advances and inventions of our mechanical age, the railroads, the telegraph, and the radio, have served to annihilate space, unify the people, and consolidate the country, acting as forces of centralization. In these respects centralization seems almost irresistible, but to the extent that centralization grows as a result of greed for power by officials and bureaucrats of any party—and each of the two great parties has offended in this respect—the tendency to centralization should be resisted to the utmost extent.

The vast expansion of governmental agencies, alphabetical organizations, call them what you will, has to an heretofore unheard of extent

centered power in Washington. In this growth of bureaucracy we at home should remember that while we are going about our respective businesses, paying too little attention to government, there is a vast army of bureaucrats, skilled in politics, and on the ground in Washington, to whose advantage it is to extend the work and enlarge the field in which their particular bureaus are engaged, and to whom that extension and enlargement often mean promotion. Let us consider a few examples of bureaucratic control which indicate the invasion of state power by the government.

The habit of giving Federal aid to local governments for local purposes has had a tendency to weaken local pride and self-reliance and to promote laxity and extravagance. If proper accountability is to be had for the expenditure of money, the state or local government should provide its own funds for its own emergencies. In the Child Labor Tax Case, 259 U. S. 20, which involved the second attempt by Congress to regulate child labor, the act was defended on the ground that it was a mere excise tax levied by Congress under its broad power of taxation. Chief Justice Taft, in the opinion holding the statute unconstitutional, said: "So here the so-called tax is a penalty to corece people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution."

Let us examine for a moment the philosophy of the Guffey-Snyder coal bill, intended for the bituminous coal industry. It was enacted into law, so the Press tells us, in order to avoid "a chaotic condition in a sick industry" and a strike threatened for this month. Congress fell in with the suggestion of the President to pass the measure "regardles of doubts as to its constitutionality, however reasonable." The Act sets up a "little NRA," a code of fair trade practices and of labor relations. It imposes a tax of 15% upon the price of coal at the mine or upon the fair value of the coal, if the mine is a captive mine. The Government and its departments and agencies are to buy coal only from producers who have complied with the Code. If the owner becomes a code member and complies, he is to get back 90% of his 15%. If he does not comply, the question arises, can he stay in business. Can the taxing power of the Constitution be lawfully exercised to bring to bear upon any industry such seeming coercion? Can there be any doubt of the tendency of such a law to centralize power in Washington, to nationalize industry, and to take away from the states power over the creatures of their own laws? It should be observed in passing that under the Guffey bill in the form in which it was proposed the Secretary of the Interior was to be authorized to use the proceeds of the tax, among other purposes, to buy "coal mines, coal properties, coal lands, mining rights, leaseholds, royalties, and any interest in coal and lands containing bituminous coal deposits suitable for mining."

Let me interpolate at this point—upon whom, after all, should the primary duty rest to determine whether proposed laws are within the constitutional power, if it does not rest with Congress? In former times Congress was not inclined to shift this burden to the judiciary, but to decide questions of constitutionality for itself, as well as questions of expediency, wisdom, and morality, into which matters the Supreme Court has not been inclined to inquire in times past. Recall, if you will, the great debates of former days over the power to create

a United States Bank, and later as to the validity of the Missouri Compromise. And has not each member of Congress taken an oath to support and maintain the Constitution of the United States?

Can there be any doubt that it is for the safety of the Union to preserve the rights of the States? It should be plain that no President, however wise, can personally govern and control the affairs of so vast a population, over so wide an area, and that his work, if undertaken, must be done by deputy—usually by bureau or commission—which again means from Washington. The growing submergence of the states in favor of the Federal government obviously has been subverting the principle of home rule. Can there be a question but that local governments can more wisely and equitably govern and regulate the purely domestic concerns of its citizenry? We are apt to forget in a country so great as ours that there are yet great differences in the habits, conventions, and ideals of the people; that the problems at home, and the day to day habit of mind and thought, are known more intimately by the people at home and by their local officials. I think it is not to be doubted that were it not for this dual form of government of ours the Constitution would long since have broken down. As our present President stated in an address delivered while he was Governor of New York, "The preservation of this home rule by the States is a fundamental necessity if we are to remain a truly united country."

With reference to the extent of the power of the Supreme Court, is was the theory of the framers of the Constitution that the Executive and Legislative branches of the government were to be held in check by the judicial branch. Yet the latter is controlled as to its procedure, to some extent, by Congress. You will perhaps recall that when one of our early Presidents did not wish a great case decided by the Supreme Court within a certain time he procured a law which changed the terms of Court in such a manner that the Court would not sit within the period he had in mind.

The people should understand that there are limits to the power of the Supreme Court. The judiciary has proved a wonderfully effective balance wheel in our plan of government, but its authority is to preserve the Constitution through the processes of litigation. That may not be commonly understood.

To begin with, there is a wide field of discretion politically in which acts can be done which are contrary to the spirit and letter of the Constitution which are not acts of a justiciable nature and so not cognizable by the courts even though they are in form, operation and motive violative of the Constitution. And in political matters officials of the government are frequently not the best judges of the extent of their own powers and of the power of the government.

Then again, as we know, the courts decide only in cases of dispute in which specific questions are presented for their consideration. A disadvantage arising from that circumstance would seem clear. In practical working, if a law is passed, it is acted upon by our citizens as presumably within the competence of the government. Years later the question of its validity is raised in a contested case. If the law is held unconstitutional the harm which may have been done by the enforcement of the law, presumably constitutional, cannot easily be undone.

You will perhaps recall that when George Washington as our first President requested the Supreme Court to render an advisory opinion as to the validity of treaties with France, the court, holding that it was merely a legal tribunal for the decisions of controversies brought before it in legal form, declined to act. While the disadvantge of such a holding is plain, there is an advantageous side, for the court is frequently saved from being driven into heated political controversies at inopportune times.

The Supreme Court has also followed the rule that a law should not be declared invalid if its incompatibility with the Constitution is not clear beyond reasonable doubt, and that a legislative act should have all doubts resolved in its favor; that if there are two possible constructions, the law should be held valid.

There is a further breach in the dam through which unconstitutional laws may flow. Over a period of sixty years the Supreme Court considered that it could not take into account motives of Congress which might be improper. This led to such frequent perversions of Federal power that in the Child Labor and Future Trading cases the position was taken that if, considering the body of the statute and not going outside its four corners, it could be determined that Congress was aiming to accomplish an end beyond the governmental competence, it could declare the act invalid. If, however, there is a motive for unconstitutional ends concealed in the statutory language, the court may well be without power to do anything about it. In this perversion of Federal powers lies a no inconsiderable peril to our institutions.

If all questions of constitutionality found in the legislation passed in recent sessions of Congress were to be presented to the courts, a veritable host of concrete cases would be necessary and the courts would require years to decide them. In the meantime the questionable statutes remain the law of the land. Then again, issues of the recovery legislation are not all decided in the courts, but are heard by boards, commissions and officials of the government, responsive to the appointive power. Rulings are promulgated with all the majesty of courts and obedience demanded.

In these amazing times it is not uncommon to hear it suggested that our Constitution is outmoded; or an endeavor is made to create the impression that it is a technical document, in part faulty and for the most part out of date, and that the old rules no longer apply. It is intimated that it is like the frigate "Constitution," a famous vessel in her day, but now obsolete and not fit to cope with modern conditions. The metaphor is misleading. The framers of the Constitution were not formulating the particular statutes or laws to govern conditions to arise in later decades. They were marking out a chart for the voyage. They were establishing great underlying principles upon which the government was to be based and from which foundation stones a suitable superstructure could be builded. They were enunciating the great principles by which laws and policies could be tested "as gold is tested by a touchstone." The one great and controlling element in the problem was human nature, with its strength and with its weakness, with passions and emotions often dominating its reason, with its selfish desires, with its noble aspirations. The makers of the Constitution knew that the will of the people must be supreme, and they intended to

make it so; but to make sure that the real will of the people should make the decision, their considered judgment, not their momentary impulse, or the passion of the hour excited or inflamed by selfish appeals or frightened by false alarms, they suggested some reasonable safeguards. I am not one who believes that all wisdom died with the framers of the Constitution, but I am quite sure that it was not born yesterday. The Constitution is not a mass of dry rules, but the very substance of our freedom, and as fitted to our present day needs as ever. It is full of human meaning, drawn as it was from the sum total of the great principles which the people won over the ages and wished established.

In his great opinion in McCulloch v. Maryland, the great Chief Justice Marshall said: "This provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the methods by which government should in all future times execute its powers would have been to change entirely the character of the instrument and to give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and best be provided for as they occur." The Constitution is a code of the people's liberties, which should never be abrogated by indirection or otherwise than by the will and vote of the people.

If the Constitution yet has general approval among the people, as I sincerely believe, in spite of the frequent attacks upon it, is it because the people know in detail its provisions or its fundamental political philosophy? Is it because it means to them representative government, or that novel principle of a dual form of government which was introduced into our Constitution, with sixty-five powers given to the Federal government, and seventy-nine withheld, of which thirteen are denied both to the government itself and to the states, with power reserved to the people? Is it because it means our governmental system of checks and balances between the three great departments of government—the executive, legislative, and judicial, with that wonderful safeguard of our liberties, an independent judiciary? I dare say it is none of these features in particular, but rather the sum total of all of them as expressed in a unified nation with a degree of freedom of action and of speech—in a word a liberty not elsewhere enjoyed; perhaps also because of pride in the power, prestige and protection afforded in our vast country of 130 million people.

The people should understand that the government and our Constitution have been developing and are yet to be developed with our changing civilization, with its immutable principles remaining the same, I trust, and with ultimate power always residing in the people. The power of amendment came after the experience of the country had shown the need for it; and as students of it know, our Constitution has been interpreted by the courts, as well as changed by amendments, some of which have altered considerably its fundamental political philosophy. And while we have had amendments from time to time, no system of government—at least until lately—has undergone so little change as ours.

I referred to changes that have occurred, through amendment, in our fundamental political philosophy. Perhaps that is best typified by

legislation which has followed in the wake of the adoption of the 16th amendment. Is it socialism that has found its entering wedge in the taxation to an almost unbelievable extent that confiscates the property of the few for the benefit of the many? Would it not surprise the framers of the Constitution to find that citizens with large incomes are called upon to pay to city, state and nation by far the largest part of them? Is this theory of government, as old in essence as human nature, appealing as it does to the desire in every man to get something for nothing, to have someone else bear his burdens and do his work for him, and discussed so long ago by Plato in his Republic, the discovery of our time "which is to wipe away all tears."

As Washington and Franklin and Hamilton all said, the success of popular government depends less upon its form than upon the moral and intellectual capacity of the people and their willingness to take an active interest in it. The people should be watchful of the nation's best interest and resist unwise encroachment. And we must remember that it is the lesson of history that the people are never so actually in danger from their governments as when they know it least, and never so nearly lost as under the guidance of those they like best.

One sometimes wonders if our people realize, particularly through such times as we have been passing, that under the checks and balances of our written Constitution, there has been an advance in human freedom and human happiness never before known in the history of the world. Those who chafe under its restraints should consider these circumstances before attempting to transform it directly or indirectly so as to change its spirit and purpose.

Who can question that the Constitution is in as grave danger today as at any time in our history, due to the unconcern of the masses to increased assaults upon its basic principles. Unless the American people awaken to the necessity of defending their priceless heritage, there is danger that within the lives of those now living great havoc will be wrought. It behooves us as lawyers to do our part to the end that the basic structure of the Constitution shall remain unimpaired; that the power of the Supreme Court shall not be curbed or curtailed; that it shall remain the cornerstone of our political system and the guardian of our liberties. It is incumbent upon us to make it clear to those who may not realize it, what is taking place, that they may take a more awakened interest in our form of government; that they may learn through participation in it and information about it to have a quickened conscience to preserve and protect its fundamental verities.

In a speech delivered in Los Angeles two months ago Mr. Beck stated to his audience that he had been told recently that he had come to be known as a defender of the Constitution. "However undeserving I may be of that recognition," said he, "I covet no higher distinction." I know of no prouder title.

PRESIDENT FOSTER: Mr. Sanborn, on behalf of the Bar of this state, I want to thank you for your very splendid address. We appreciate it very much.

MR. YOUNG: Mr. President, at this time, in conformity with our usual practice in this Association, I should like to move that Mr. Sanborn be made an honorary member of this Association.

(Several seconds were heard, a rising vote being taken on the question, which was unanimously carried).

MR. SANBORN: I appreciate that very much.

MR. FOSTER: For the next thing on our program, we have with us this afternoon a representative of the American Bar Association, a gentleman who was on our program at Fargo some three years ago, as I recall it, known to most of the members of our Bar from that meeting, and other contacts. He is not listed for a speech, and I understand he does not intend to make a speech, but he has a matter of importance which he wishes to take up with our Association. If Mr. Stinchfield is here, we would like at this time to have him take up that matter now.

## CO-ORDINATION OF THE BAR

MR. STINCHFIELD: Mr. President: This is not an address—it is not even written out. If you would find it no disrespect to yourself, may I be allowed to talk to these ladies and gentlemen from here. I am here without an invitation; therefore, for what I have to say, and for the intrusion, do not hold your officers responsible.

I had a telegram from the President of the American Bar Association day before yesterday, asking me to come up for a particular purpose. He said that he was slated to go to the Bar Association in Indiana, as they were having a meeting at this time, and that the Secretary of the Association had to be in Mississippi at this very time—otherwise, I think he was scheduled to come here—and would I be so good as to come to North Dakota, owing to the inability of either gentleman to be here with you.

For three years the American Bar Association has had in its mind what it calls co-ordination. Now I have taken the trouble since I have been here this morning to ask some of your distinguished members if they knew anything about co-ordination, or what it meant. None of them did. Your secretary, to a considerable degree, was familiar with it, and your President somewhat. Mr. Murphy of Grand Forks didn't know there was such a word as applied to Bar co-ordination, and Mr. Wattam was equally in the dark, and I have not had a chance to talk to the rest.

Let me tell you quite shortly what it is hoped to do. There has been a feeling, I believe, and I am quite sure it must have been apparent in North Dakota, that lawyers in the last few years have lost some of the heritage they had of standing in the community, an honorable standing in the community. A slight review in your minds will indicate to you that we have lost some of the jurisdiction we used to have, and generally the layman has usurped a half dozen things in the way of trusts, wills, development of bureaus, tax matters, and half a dozen other things, which possibly are listed. In all those things, our form of jurisdiction has been invaded by laymen, and generally when the jurisdiction of any citizen is invaded, and a part of his heretofore rights have been taken away from him, he deserves to lose them.

There must be a considerable weakness in the possessor of property or rights who permits them to be taken away from him. Anyhow some of them have gone and so far as one can foresee, we are in the process of losing others. If I understand Mr. Sanborn's address cor-

rectly, it is apparent that even the President of these United States thinks that the phrase "Due process of law" should be entirely stricken from the Constitution.

Now the American Bar Association has thought it would be desirable if there could be concentration or unity among all lawyers of America, but without the loss of our local rights. The meetings of the Bar Associations are indicative of the fact that we have not been working together. Even in your own state, you have, I take it from evidence I have collected, some five or six hundred members, and you are incorporated, that is, you all have to be members of the Bar Association. I suppose there are here today a hundred to a hundred and twenty-five. Well, in Bar Associations everywhere the result is substantially the same. A few men are interested in Bar Associations, and a few of the few men do the work, and generally from time to time there is a considerable uproar because they say there is a group within that is organizing and controlling the Bar Association. I don't know anything about your local situation, but I have heard it almost everywhere, and in the meantime we are losing rights, and we are losing standing in every community in which we operate.

The American Bar Association hopes to stop it and hopes also to create in us a desire, when it is necessary, to clean our own houses and to see that we practice law more according to our conscience than according to technical legal possibilities. Elihu Root suggested it in about 1915, but with wartime routine, it became less active and the proposal was not universal until about three years ago, when a chap named Phil Winrox of Buffalo, New York, devoted himself to the work that he thought ought to be done, and the American Bar Association formed a Co-ordination committee of five men. Recently that committee has been increased from five to seven, the two additional members being John W. Davis and Newton D. Baker, who have just been put on the committee. I presume there are some Republicans on the committee, too—I don't know, but they are two very distinguished men and very distinguished lawyers, and hereafter they will lend their efforts, together with these other men, to this co-ordination program. The Carnegie Foundation has given $50,000 to the committee to be expended in connection with the co-ordination program the American Bar Association has planned. They figure $100,000 is to be spent in three years, one of which has passed and the pro rata portion spent.

There are all sorts of co-ordination plans proposed for bringing the associations together, but none has yet been accepted. There was a meeting in Washington last May in which there were perhaps 20 or 25 men present from different parts of the country to discuss this matter. There was a meeting in Los Angeles which, according to reports, was successful. There are to be meetings this year with anybody who is willing to come to Bar Associations to discuss this matter. I have no doubt this association will be asked to send some man or men to some gatherings of people to discuss this plan of co-ordination. Now, understand, that fundamentally its own purpose is to bring together all the active organizations in some, not necessarily mechanical union, but at least in a union of ideas in working for the common welfare of the lawyers, and incidentally we hope for the common welfare of the public. All I have to say to you, all I want to say to you, is to create in you a feeling, if I can, of the desirability of the lawyers in your as-

sociation working more closely together; more of the men who could devote themselves, giving their energies to the work of the association, and planning that your association and my association and California and New York and southern associations all over the country can have some sort of machinery by which the common desires and welfare of lawyers everywhere can be promoted, not selfishly only, but for the purpose of helping ourselves, cleaning our houses, regaining for ourselves the position we used to have and the position we ought to have. And if, Mr. President, in your executive committee, there is a suggestion that you send a leader to some meeting, a representative of the North Dakota Bar Association, I trust your executive committee will look on it with favor. You are not in any way saying that any kind of plan of co-ordination today is desired, but at least, if you will have it in your mind, hope for its accomplishment, and send some man to confer with other men and other associations throughout the United States, it shall be most gratifying, all of which, Mr. President, I am very pleased to have the opportunity to say. I am very much obliged to you for your patience, but please bear in mind the hope and thought that we should be united and that all lawyers should get together for the betterment of ourselves and for the betterment, I think, of the communities which we serve.

PRESIDENT FOSTER: After listening to Mr. Stinchfield's talk—I think he is already a member of our Association, I believe it would be in order, if you think best, for this Association to adopt a resolution at this time, so that we will have some record of it, and to the effect that the Executive Committee be authorized or directed to appoint a committee to operate long the lines suggested by Mr. Stinchfield, and with authority to appropriate, if they see fit, the necessary funds to send a delegate to such meeting as may be had. If every one thinks that is all right, we will be glad to entertain such a motion.

MR. LAMBERT: Mr. President, I so move. (Several seconds were heard).

PRESIDENT FOSTER: It has been moved and seconded that a resolution be adopted directing the incoming executive committee to appoint an appropriate committee of this organization for the purpose of cooperating with the efforts of the American Bar Association in coordinating the Bar, or whatever this happens to be, with authority to appropriate the necessary funds to send a delegate to such meetings as may be held. All in favor of the motion signify by saying aye; opposed say no; motion is carried.

The next thing on our program is the report of the Committee on Education and Admission to the Bar, and discussion of that report—Dean Thormodsgard of the University.

MR. THORMODSGARD: Members of the Bar and Guests: At the invitation of the President, I have prepared a brief report on the trends in legal education which I will read first.

## TRENDS IN LEGAL EDUCATION

DEAN O. H. THORMODSGARD

It has been my privilege to attend some of the annual meetings of the American Law Institute at Washington, D. C. It was the common

practice to have Mr. George W. Wickersham, President of the Institute, give an address as to the purpose of the Institute, and the significance of the work it is doing in restating the common law. The rest of the time, I had the pleasure of listening to the discussions of the particular re-statements by judges, lawyers, and law professors. I was impressed with two facts:

(1) That we were engaged in a distinctly modern educational movement;

(2) That it was a movement in which the three branches of the legal profession, the lawyers, judges, and law teachers found a common meeting ground. In other words, the work of the Institute demonstrated the value and importance of the co-operative efforts of lawyers, judges, and the teaching profession.

The problem of legal education is also a field for the joint concern of the judges, practitioners, and law teachers. For that reason I appreciate the opportunity of attending the annual meeting of the North Dakota Bar Association and to become better acquainted with the members of the North Dakota Bar. I appreciate the fact that the future success of the University of North Dakota School of Law depends in a large measure on a close contact and constant association with the judges and lawyers of this state.

The lawyers in this state, who have practiced law from ten to fifty years, realize the great changes that have taken place in the legal and business world. Even in an agricultural state like North Dakota, the changes in business methods, banking, transportation, and the enactment of regulatory laws and tax laws have forced the lawyer to assume the role of business adviser and counsellor. The problems that come into your office present not isolated questions of law, but rather combined problems of finance, accounting, and law. Many functions formerly performed by lawyers have during this changing period been transferred to or assumed by banks, trust companies, and other business organizations.

Public law has, like private law, changed during the past fifty years. In this state as well as in every state, we have noticed the growth of administrative bodies and the resultant development of administrative law. The Federal Government in recent years has created several important administrative agencies. Within the last month the Motor Carrier Act and the Social Security Act were passed, which will give new opportunities for administrative practice. The rapid growth of administrative law is the most important change in British and American law during the past half century. These administrative agencies were created to deal with social and economic problems which the regular judicial bodies were unprepared to solve. In practicing before an administrative board, we are dealing with an agency of the state and the state is an interested party. Former Dean James Grafton Rogers of Colorado, now Professor of Law in Yale, said in a speech recently delivered, "The Bar is year by year involved in administrative law. An estimation made the other day in one of the midwest cities that sixty per cent of the energy and time of the lawyers in that city was going into administrative as distinguished from common law work."

Because of these changes in Public Law, many law schools are offering extensive courses in Trade Regulation, Public Utilities, Taxation, Administrative Law, Labor Law, and Workman Compensation Law. Attempts are being made to combine some of these subjects under one classification and offer a comprehensive course entitled Public Law. Great changes are also being made in the fields of social legislation, domestic relations and the criminal law. The judges, lawyers, and law teachers are securing information and knowledge from sociology, medicine and criminology. The American Bar Association, the American Judicature Society, The American Institute of Criminal Law and Criminology, and the Judicial Councils of the various states, and other agencies, are trying to find solutions to these new problems which will harmonize with our legal and political institutions and at the same time be justified in terms of benefits and gains to society. The law school curriculum must adjust itself to these changes. In a large measure the standards of the American Bar Association have emphasized an extensive pre-legal training so that the law students will have a broad cultural background and be prepared to make use of economic and social data in the study of law. In law schools like Columbia and Yale, they are experimenting in having certain law courses given jointly by law teachers and specialists in related fields. For example, Evidence is taught jointly by a Professor of Law and an expert in psychology. Public Utilities is taught jointly by an expert economist and a law teacher. Domestic Relations or Family Law, as it is now called, is taught by a law teacher with the assistance of expert social workers. Other illustrations could be given.

Modern law books contain not only cases, but text material in law as well as materials from the social sciences. Instead of teaching separate courses in Agency, Partnerships, and Private Corporations, some schools now offer a unified course entitled "Business Organizations." The purpose of such a combined course is two-fold: "(1) To present a connected series of materials, so organized as to bring realistically before the students the relative advantages and disadvantages of the various forms of business associations; and (2) to avoid, as far as possible, the repetition necessarily involved in the disjointed treatment of the several branches of the one entire subject matter." In place of the traditional classification of Mortgages, Suretyship, and Bankruptcy, several schools are offering the course entitled "Creditor's Rights" which deals primarily with the problems of the unsecured creditors. Cases on Receivership, Bankruptcy, Enforcement of Judgments and Fraudulent Conveyances are studied. The course in "Security" includes the study of the use of security devises such as suretyship, pledges, letters of credit, trust receipts, chattel mortgages, real property mortgages, and conditional sales. The casebook in "Trusts and Estates" is patterned on the text book of Jarman on Wills, which deals with Wills, Trusts, and Future Interests.

These changes are not as great as they appear. Professor Williston of Harvard said in effect, "the new law books deal with the same law, but have a different title." These new case books have merits in that they deal with related legal and business problems. There is less waste of time and duplication of work by having related law courses united into one course.

The rapid growth of federal and state legislation increases the need and importance of the scientific study of statutory interpretation. Not only must the practicing lawyer be familiar with the technique and principles of the common law, but he must be familiar with the technique of applying legislative precepts to the particular set of facts before him. The law schools are aware that more time should be devoted to the study of the technique of statutory interpretation and legislation. Many of the larger law schools are offering a graduate course of this type. Columbia now requires all first year law students to take the course entitled "Legislation." According to the Columbia Law School Bulletin: "This course deals with legislative development of the law; fact bases of legislation and judicial review; types of statutes, legislative language and its interpretation; legislative sanctions and the indirect effects of legislation on tort and contract law, subordinate legislation and constitutional control of legislative procedure, language and form. The student will be given training in finding and applying statute law." As pointed out by the late Professor Jalmer O. Muus in his article entitled "Influence of the Civil Code on the Teaching of Law at the University of North Dakota," we use the case method of instruction. The common law is presented first, but we attempt, especially to the second and third year students, to refer to the Code. "Since the Code is one of the legal materials which the lawyers must use in arriving at the solution of legal problems, reference is made to what extent the code has abrogated, enlarged, or otherwise altered the common law." Our school is not a national law school, but an institution of the state; hence, we believe it is our rightful duty to compare the common law principles with the statutory rules of this state.

There are twenty approved law schools which offer courses in Legal History. North Dakota is one of them. There are fifty-seven approved schools which do not offer courses in Legal History. The bar examiners' standards in the various states have to some extent prevented law schools in general from allowing credit for Legal History. Fortunately in this state, the bar examiners have placed Legal History and Philosophy as one of the required bar subjects. It is a meritorious requirement, and is a step in the direction approved by Professor James Grafton Rogers when he prophesied that "The Law will rejoin its old companions, literature, history, and the arts."

Harvard's aim is stated in its catalogue as follows: "The School seeks as its primary purpose to prepare for the practice of the legal profession wherever the common law prevails. It seeks to train lawyers in the spirit of the common legal heritage of the English speaking people. Along with and inseparably connected with this purpose are two others, namely, the training of teachers of law, and the investigation of the problems of legal adjustment of human relations and how to meet them effectively." Michigan's Bulletin gives its aim in the following words, "While a primary function of law schools is to afford a broad training for the practice of law in an enlightened manner, it is highly important that there be adequate provision for the development of law teachers, scholars, and writers." Columbia's aim is stated to be, "Not only to fit its students as completely as possible for the actual practice of law and the conduct of public affairs but also, by the encouragement of scholarship and research, to lay a substantial foundation for legal authorship, and furnish preliminary training for the pro-

fession of the law teacher." North Dakota's aim is stated to be, "It is organized primarily for those men and women who intend to practice law and secondarily for those who intend to enter the service of the state or to use legal attainments in some other capacity." Generally the primary purpose or function of a law school is for the training of practitioners. As an incident to this work the law school may give training in legal research, legal authorship, and in the training of law teachers. In a law school of the size of North Dakota, with a student body varying from 65 to 75, with a faculty of four full time teachers and three part-time teachers, our primary function is to teach the fundamental principles of the common law and the statutory law.

In teaching law, a small law school can do creditable work, but on account of a heavier teaching load, smaller library, and limited funds, we cannot engage in extensive research work like the men in the larger institutions. However, students who give promise of ability are given opportunities to engage in individual research work. Research work should not be carried on at the expense of excellent daily work. This year two of our promising graduates were granted scholarships for research by the Universities of Michigan, Northwestern, and Chicago.

In a large measure these new trends in law teaching are being tried out in the larger law schools, where they have large faculties, large enrolments, and where they have endowments for legal research. After these new methods have been tried and proved successful, some of them are adaptable to a school of our size.

We believe that the School of Law should be adequately staffed with full-time men. There are educational and professional merits in having lawyers as part-time teachers of law. When financial conditions improve within this State, we hope the legislature will restore the "Law Lecture Fund" so we may have the opportunity to call in some of the leading judges and lawyers of this state to give Special Lectures to the faculty and law students. Legal education is a field for the joint concern of the judges, lawyers, and the law teachers.

MR. THORMODSGARD: Mr. President, I have now the privilege to report on the Committee on Education and Admission to the Bar, but since this report will be printed, and it is getting late, I move that it be adopted and printed in Bar Briefs, unless you want it read.

PRESIDENT FOSTER: It has been moved that the report of the Committee on Legal Education be adopted and printed. Do I hear a second to the motion?

(The motion was duly seconded, submitted and carried).

## LEGAL EDUCATION AND ADMISSION

Your Committee on Legal Education begs to submit its annual report as follows:

The history of legal education in North Dakota shows a progressive growth and development. In a large measure it is tied up with the history of the University and the North Dakota Bar Association. President Webster Merrifield of the University and Chief Justice Guy C. Corliss recommended in 1898 to the Board of Trustees

the organization of the School of Law of the University of North Dakota. Their recommendation was approved by the Board of Trustees.

In the autumn of 1899 with a faculty composed of Dean Corliss, John E. Blair, Tracy Bangs, George A. Bangs, F. B. Feetham, and other leading members of the Grand Forks bar, the law school was opened. The curriculum of the School of Law covered a period of two academic years. The student body consisted of men eighteen years old or over who had completed the work ordinarily covered in the common schools. Under the leadership of Dean Andrew A. Bruce, the School of Law increased in numbers. He also adopted the policy of appointing three full-time law teachers, who gave their exclusive attention to teaching law. Up to 1905, the diploma from the Law School admitted the graduates to the bar. In that year the diploma privilege was abolished by the state legislature.

In 1906, the entrance requirements to the School of Law was two years of high school work. In 1909, the state legislature passed a law requiring all bar applicants to have studied law for three years in a law school or in a law office. So the law school increased the curriculum to three years. Also in 1909, the entrance requirement to the School of Law was raised to fifteen units of high school work. Having adopted the then standards of the American Bar Association and the Association of American Law Schools, the School of Law was recognized as an "Approved" law school.

Since 1910, the Law School has been a member of good standing by faithfully complying with the requirements and standards of the Association of American Law Schools. By 1921, the Association required law students to complete one year of college work prior to registering in a law school. By 1923 the Association's standards of an "Approved" law school as well as that of the American Bar Association was that the students should complete two years of college work prior to studying law. The law school complied with these standards. In 1927, 1928, and 1929, the Committee of Legal Education of the North Dakota State Bar Association, recommended that candidates for admission to the bar must have two years of college training in addition to the required legal education. In 1931, in response to these repeated recommendations, the state legislature approved a bill which in effect adopts the "standards" of pre-legal education of the American Bar Association.

There are twenty-five states in the Union which require two years of college study or their equivalent of all candidates for admission to the bar. Eighty-five law schools in the United States are approved by the American Bar Association. The University of North Dakota School of Law is one of them.

North Dakota law students are entitled to a legal education in an "Approved" school and a law degree from a law school to the same extent that a North Dakota college student is entitled to secure a Bachelor's degree from an institution recognized by other schools and in other states.

According to the Constitution of the Association of American Law Schools, the faculty of a member school "shall consist of at least four

instructors who devote substantially all of their time to the work of the school." From 1923 to 1931, the School of Law had five law teachers devoting all of their time to teaching law. In the school year 1931-1932, because of economy, the School of Law also taught two courses in Business Law for the School of Commerce. During the academic year, 1931-33, the University attempted to conduct the law school and teach the Business Law courses with four full-time teachers. The University was warned by the Association that the School of Law did not comply with the standards as to the number of teachers, so the law faculty was enlarged. Now it has four full-time law teachers and three part-time teachers from the Grand Forks bar. A University law school should have on its faculty the required number of full-time teachers as well as special lecturers from the Bench and Bar. Credit should be given the part-time law teachers for their services to the school. For the size of our law school and the courses it is offering, it is now complying with the minimum teaching staff requirements. The Association rules require that the law library "shall be so housed and administered as to be readily available for use by student and faculty. . . . For additions to the library in the way of continuations and otherwise, there shall be spent over any period of five years at least ten thousand dollars, of which at least fifteen hundred shall be expended each year." The school has been able during these depression years to continue its standing orders and law series. It has not had the funds to buy many of the recent law books and statutes, which should be in an "approved" law library. It should be borne in mind that to be recognized as an "approved" school, the Law School must comply with the requirements as to pre-legal education, teaching staff, and library facilities. When economic conditions improve, greater service to the law students may be given by granting funds for library purposes. It is difficult to maintain the professional standards desired by having a large faculty turnover. With better salaries a more permanent faculty staff could be maintained. The standards of legal scholarship and the standards of the legal profession would constantly improve with greater funds for the library and for the teaching staff.

During the acamedic year, 1934-1935, the enrollment in the School of Law was as follows:

| | First Semester | Second Semester |
|---|---|---|
| First Year | 36 | 36 |
| Second Year | 28 | 23 |
| Third Year | 16 | 18 |

In 1935, sixteen students graduated from the School of Law. It should be noted that nine out of the sixteen were also graduates of the College of Science, Arts and Literature. It may be said that the growth of the school has kept pace with the economic demand of the state. There is no indication that the enrollment will increase beyond its present numbers.

The committee desires to call attention to the Minnesota plan for training lawyers. "The aim of the Minnesota plan is to give the students a training designed and adequate to enable him to discharge the function of a lawyer in society." The University of Minnesota School of Law plan is to permit the students to enter with two years of college. They take the regular three year law course. The fourth year in law is devoted to the following subjects:

1. Administrative law; a study of the administration of law by public commissions and officers.

2. Judicial administration; a study of the function and method of judicial administration, the organization of courts, the selection of judges, qualification and organization of the legal profession, the jury, problems of procedure, and reforms adopted and advocated.

3. Jurisprudence; the subject matter of this course includes theories of law and justice, relation of law and social sciences, general methods of legal reasoning, and general conception employed in legal analysis.

4. Legislation; Agencies, content, and province of legislation; relation to common law; preparation of drafting; sanctions; interpretations. In addition to these the students may elect courses on Government, Regulation of Business, Labor Law, International Law, Accounting, Business Cycles, Corporate Finance, etc.

The relation of social science and government, with that of law is studied in the fourth year at Minnesota, after a student has had three years of law. In the majority of institutions the courses in social science and government are studied before entering the law schools. Many legal scholars are of the opinion that to cover the law properly, four years of law school work should be required and only two years of college. Many of the law schools prefer three or four years of liberal education before law. The institutional cost is less by requiring all students to have an additional year in college than to add a fourth year to law study. However, the Minnesota plan has merits and is being watched with interest by the law schools in the United States. If the Minnesota plan improves the quality of law graduates, other schools may move to adopt the four-year law curriculum.

All those who are vitally concerned with legal education, take a great deal of interest in the aims and the objectives of the National Conference of Bar Examiners. Through this National organization, there will be a gradual improvement in the quality of bar examinations. There will be greater uniformity in the type of examinations which are given. Some examinations are too easy, others are too difficult. A fair examination should be given to test the legal knowledge of all candidates. Through the united efforts of all bar examiners, the educational standards and the character requirements for admissions to the bar will be improved, with fairness to the applicants and for the good of the public. The law schools of the United States and the Bar Associations should cooperate with the bar examiners in this important phase of legal education.

Respectfully submitted,
O. B. BURTNESS,
DANIEL B. HOLT,
O. H. THORMODSGARD, Chairman.

MR. FREDRICKS: I don't know just how heavy the balance of the program is, but I am here, riding with another man, and I can't remain longer than today. Might I have the privilege of submitting a resolution?

PRESIDENT FOSTER: You may go ahead.

MR. FREDRICKS: Mr. President and gentlemen of the bar: I am going to introduce a resolution that is going to make the fur fly a little.

## RESOLUTION

BE IT RESOLVED, by the North Dakota State Bar Association in Convention assembled, at its regular annual meeting at Grand Forks, North Dakota, that whereas there is now and for many years has been in existence publishing concerns or corporations which are carrying on the business of compiling lawyers' lists and publishing those lists in book form, some of which, in a comprehensive method, take in the entire United States, Canada, and other countries, and, in the published list of attorneys, by a system of letters and figures, they pretend to indicate and grade the professional ability, standing and reputation of the respective attorneys so listed, or, by prominently indicating that certain attorneys have no rating, and,

WHEREAS, such published lists or books are extensively sold and distributed among lawyers and business concerns all over the country with the view to guide prospective clients in the selection of counsel located in the locality where such prospective client might have need for professional aid, and,

WHEREAS, it is well known that the process of grading, above referred to, is secretly carried on without notice to the attorney whose standing and professional ability is thus marked and indicated, and,

WHEREAS, it is likewise well known that there exists no standard by which or under which such markings or gradings are measured or arrived at, and,

WHEREAS, it must be apparent that in many instances such listing or grading tends to operate as a black-list to those not in favor, and, further, that in cases where the higher or highest rating is bestowed, with respect to them it borders on inethical and pernicious advertising, although not promoted or solicited, and,

WHEREAS, there is no other profession where such practice is the vogue or tolerated.

NOW THEREFORE, be it further resolved, that the publication and circulation of such lists and such gradings and ratings is frowned upon and condemned as entirely unfair, ungrounded, and unprofessional and inethical, and we hereby recommend that the legislative committee of this association make a thorough investigation of the matters herein referred to and promote the passage of legislation to prohibit the publication and circulation and selling of such books, lists, and ratings, and to declare that the use of such publications as an advertising medium by members of the bar in this state be deemed unprofessional and inethical.

MR. FREDRICKS: I move that this resolution be adopted.

MR. WARTNER: I believe that the proper thing to do with that resolution is to refer it to the Executive Committee for action.

MR. FREDRICKS: I want to be heard a few minutes on this resolution—although there seems to be no controversy—somewhat in defense of my attitude. I am not speaking for myself alone, and it is not a matter of personal concern with me, but if it were, it would be justified. I hope that I would feel just as indignant about it if I stood here with the highest known rating. Gentlemen, I have known and you all have known that publications of this kind, and notably the principal offender

is Martindale's; they may not be actuated by any improper motive or any design to injure anybody, but nevertheless it is a business with them and they are sugar-coating the prospect of a highest rating to members of the Bar in consideration of buying or becoming a subscriber to their publication and carrying legal advertising. Now I haven't any objection to anybody's advertisement. I am not an advertiser—I don't like any kind of advertising, commercial or professional, and I hope that I have never been guilty of advertising professionally. I have no objection to the lawyer enjoying a flattering rating, but I know, I am old enough in the business and profession to know that a lawyer's reputation usually comes from what people know of him in court and what his associates and friends say of him, but when it comes to grading a two-year-old calf or some blooded pig, or some fine horse, or a bushel of wheat, at least they show you how they arrive at it. They show you a method by which they conclude that the points are present, but I would like to know by the name of everything that is holy by what authority some concern from New York can slip around the back streets of the city, without notice to anybody and say "Fredricks, poor" or this gentleman or that, Mr. Lambert or Mr. Halvorson is a grade or two below the other man. How are they going to say that and by what standard do they arrive at it?

I had occasion to mention this to the doctors and they were amazed that lawyers stood for any such system as that. Now then, as I say, I haven't any personal interest in this matter. I know that some members of this very Bar have had an A or B rating, and for some reason or other, they now have no rating, and there is no reason stated why not, and when some friend of this party, or these parties, picks up Martindale's in New York, Chicago, or some other place, and he finds that condition, does that not act as a black list? Does that not operate as an injury? And still we as lawyers stand here and permit an outfit in New York, or some business concern in an unprofessional class to put a stamp on our size, our capacity, our standing and ability, in book form and publish that to the world.

I hope that the committee that takes charge of this will thoroughly investigate this matter, and that legislation will be introduced to put a stop to that, if for no other reason than to maintain our own dignity.

PRESIDENT FOSTER: The motion before the house seems to be to refer the resolution to the committee on resolutions. Do I hear a second to that? (Many seconds heard).

MR. WARTNER: That is a motion to refer it to the executive committee.

MR. OWENS: I am opposed to that; that is just exactly the thing, Mr. President, I am opposed to. Why is the executive committee to take that matter under consideration any more than any man that is practicing law here at this meeting? I have been practicing law here for twenty years. I don't know how I am rated in Martindale's and I don't give a darn. I don't care how they rate me. That is the condition surrounding the young fellows in this state. Just as Mr. Fredricks has stated, that same kind of individual comes into this state, goes to one or two leading attorneys and gives them a double A-1 rating; then he goes out into the country and maybe thirty or forty per cent are called on in the country successfully, and the balance are up against the prop-

osition of having a very low rating because they do not happen to be in the position of representing the utility companies, railroad companies or banks. Both of us are doing our duty; both of us have equal ability. Perhaps the man defending the poor unfortunate devil's rights has the same ideals and aspirations, the same high ethics as the big fellows. These men come in here and go to one or two places in each town, and they go to practically every town in the state, and give them a high rating, and then if we don't take their book and pay them seventeen dollars, we don't get a rating.

As far as I am concerned, I don't want to see this passed to any committee; no committee has got any more brains or intelligence to decide this matter than the man rated in Martindale's or any other directory, regardless of the fact that he has a good or low rating.

MR. FREDRICKS: I am not quarreling with the gentleman there at all, but we can't pass any laws here. All I am hoping to accomplish by this matter, gentlemen, is to throw this thing in the hopper where it gets into the proper channels with a view of passing some statute to control this situation and it don't make any difference which committee has it in charge so far as I am concerned.

MR. ————————: I would like to take a moment on a matter in regard to that very identical question. Judge S———— of Sioux Falls, South Dakota—everybody in the northwest knows him, had a quarrel with the company; before that they had him rated where he belonged. After that the directory failed to rate him at all. We brought an action against them and the Supreme Court of South Dakota said that they were under no obligation whatever to rate him, or not rate him, so there the matter rests in South Dakota.

MR. FREDRICKS: Our own Supreme Court has spoken on that subject. The matter is now coming up before them in a case pending before the state courts, not as to whether or not they have a right to do it, but a lawsuit pending against Martindale Company for libel. They tried to dodge away from it, claiming not to be a resident of the State, and therefore couldn't get service on them. They were held to be residents, and the Supreme Court sustained the point.

What I am trying to say is we can at least control the lawyers; we can say it is unethical for the lawyer to go down the street with the label, "I am the best lawyer in the State of North Dakota." That is exactly what you are doing with the rating you are buying for thirty dollars a year. I have no objection to buying the book, but if this outfit goes to work and B rates somebody else and does it in the dark, if there is no law in South Dakota, for God's sake, let's see if we can pass some law in North Dakota that will control that situation. It isn't fair.

PRESIDENT FOSTER: Any more remarks? The motion of Judge Wartner is before the House. Any more remarks before we vote upon the motion?

MR. ELLSWORTH: May I ask what the motion of Judge Wartner is.

PRESIDENT FOSTER: It says that this matter be referred to the Executive Committee for consideration.

MR. WARTNER: For action.

MR. FREDRICKS: For action, and take up such matter with the executive committee.

MR. ELLSWORTH: Before the next meeting of the association?

MR. FREDRICKS: The next legislative session.

JUDGE BRONSON: I want to say a word on this pending resolution. I want to say to you that at the American Bar meeting at Los Angeles, there developed in this coordinating bar movement considerable thought that it was time for the lawyers to start rating themselves. In connection with the activities of the American Medical Association, and in connection with the directory which they issue covering all the physicians and surgeons of the United States, one of which I have on my desk, it seems they prefer to attend to that matter themselves.

And now, in this coordination movement, has come along the proposition of organizing the entire bar of the country, some 178,000 lawyers, some 66,000 of which belong to various associations throughout the United States; some 28,000 belong to the American Bar, and they are doing more for the lawyers in a united way like the American Medical Association does for its body of membership. So this matter that has been spoken of today is not purely local—it is a matter that needs a little attention and thought. It is going to be presented at the mid-winter meeting of the general council of which I am a member from North Dakota.

At a meeting of the executive committee, they were considering four definite propositions that had been presented and were presented at Los Angeles for coordinating the bar and these four propositions, without taking any great length of time, involve this: (1) Continue as it is: (2) Try to resolve itself into a body functioning along the lines of the medical association with the delegate system. (3) Continue the present organization as it is but functioning in a larger capacity with full representation of the various bar associations of the country so as to tie it up with the activities of the American Bar Association. (4) Functioning very much as it is with added activities and furnishing lists of publications on matters of service that even go into the law publications furnished to the bar of the country, like the medical association, instead of lending itself to legal publications of the country. This is a prime factor before the American Bar Association in the coordinating move and it is well to refer it to some committee to give it some attention.

MR. LACY: I move an amendment. I move that instead of the resolution being referred to a committee, that it be accepted and placed of record by this association as it has been read.

(The motion was duly seconded, and submitted but some question about its carriage arose.)

PRESIDENT FOSTER: There is some uncertainty. Those in favor will please rise. (A count of 17 was made). Those opposed. The motion is lost, that is, the substitute motion.

Now the question on the original motion of referring this matter to the executive committee for such action as they see fit. Is that correct, Judge? Before the next meeting of this association. Those in favor of such motion will say aye.

MR. LEWIS: I would like to offer another motion. In view of the fact that Judge Bronson has mentioned this whole matter is up before the American Bar Association, I believe it is one which should not receive hasty action. I think it should be referred to the Executive Committee for action and reported back to this session next year.

MR. WARTNER: I will accept that substitution, if my second will, that is to have that motion incorporated in my original motion. We will have another session before the legislative session.

MR. FREDRICKS: All I am aiming at is to get this into the hopper. I don't care how you do it.

MR. FREDRICKS: I will consent to such a substitution.

PRESIDENT FOSTER: The motion now is that the resolution be referred to the executive committee for consideration before the next meeting of this association, at which time they will report back. As I take it, this report will incorporate whether or not it is advisable for recommendation by this association.

All in favor of the motion signify by saying aye; opposed no; motion is carried.

The next thing we have on our program, and I want to at this time apologize to the young gentleman whose name is listed as DeWitt; his name is Devitt of the University of North Dakota.

## THE JUNIOR BAR

### MR. DEVITT

Mr. President Foster and members of the North Dakota Bar Association: I do not have a very weighty problem to discuss with you today. I should say rather that my talk is somewhat of an informatory nature, to tell you something about a recent trend, and I think, very profitable trend, in legal education. I want to tell you more specifically about the completion of an organization on the University of North Dakota campus called the Junior Bar Association; and, if I may, tell you about its activities through the year and lastly about our future aspirations. I don't know exactly in what capacity I address you this afternoon. Most certainly I am not a law student because I have already finished law school; and I don't think I am a practicing attorney, because, although I have been practicing now for thirteen and a half days, as yet I haven't had much to practice on. In any event, I believe I am not yet listed in Martindale's Law Directory.

It was Theodore Roosevelt who once said that every man should contribute some of his time to the upbuilding of the profession to which he belonged. That that bit of philosophy has been accepted by the legal profession, is attested to by the fact that there are over 1200 bar associations in existence today, and their activities are wholly due to the work and the labor and the time spent on them by their lawyer members. I am inclined to believe this afternoon it is the same kind of philosophy which underlies the reason for the establishment, in the last five or six years, of junior bar associations throughout the United States.

I am very proud at the outset to say that we here at the University of North Dakota are among the first to establish such a student Bar

Association. Well, I suppose you are thinking to yourself, "Just what is the junior bar association, and what does it intend to do?" In the first place, I might say to you, it is modeled very much after your state bar association and after the American Bar Association as well. The ideal and typical junior bar association has its duly elected officers, together with various sections which make reports at periodical meetings. Thus, it would have a section on legal education, a section on recent statutory changes, a section on constitutional amendments, etc.

What does the junior bar intend to do? I suppose that the chief thing it does, or intends to do, is this. You lawyers, or some of you at least, have been out of school for forty or fifty years. Mr. Tracy Bangs this year is practicing law for his fiftieth year. I suppose you have forgotten somewhat of how tedious a job it is going to law school, to say nothing of the effort and exertion expended by the members of the faculty. I want to say that it really is a kind of a monotonous job to continually read cases and brief them and recite on them, day after day, and month after month, for three or four years; so the main object of the junior bar association is to make the study of law more of a "sugar coated pill" to take, if I may express it that way. In addition to that, besides enlivening the student's interest in the study of legal science, it attempts to prepare students who are still in school for more active work in the bar associations of the county, state or nation which they will enjoy when entering the active practice of law, and lastly, the Junior Bar Association trains its members in legal ethics, a very important subject, but one which is difficult to teach in the regular law school curriculum.

The first Junior Bar Association was started in the University of Southern California in 1929 by the then Dean Miller of that institution. But it was not till he moved to Duke University at Durham, North Carolina, that he enjoyed his greater success in the new work. There, he organized the Duke Junior Bar Association—perhaps the best organized of all the new student groups. This organization holds periodic meetings, reports on various legal subjects are heard by student members, a discussion follows and the meeting is usually concluded with an address by some prominent member of the Bench or Bar of that vicinity.

Gradually the junior bar movement spread throughout the country to Ohio State University, the University of Colorado next and eventually to our own University of North Dakota. So far as I am able to determine, and I must confess that my source of information is very limited, only about eight active junior bar associations are in existence in the United States today. So you can see that we here at North Dakota are ranked with the best law schools of the nation in adopting this new adjunct to present legal educational methods.

What about our organization? Last fall, with the very fine encouragement of Dean Thormodsgard, as well as other members of the faculty, and prompted by the partial demise of the legal fraternities, we formed the North Dakota Junior Bar Association. Our set-up, or course, is not as extensive as at some of the other schools, but we have a very auspicious beginning. We believe that we are destined for a very profitable future. As regards our activities, I might mention the fact that we had at our first meeting Mr. Tracy Bangs who addressed us

on the "Constitution." At another time, Mr. C. J. Murphy addressed us on the subject of "Public Utilities." Later, Mr. Fred Traynor came from Devils Lake to speak to us on "Legal Education." At one of the later meetings Mr. O. B. Burtness addressed us on the subject of "Should the Young Lawyer Enter the Political Arena," and the ensuing discussion was considerably embellished by Mr. Harold Shaft, also of the Grand Forks Bar. All of our meetings are luncheon affairs, followed by a discussion and sometimes those discussions become very heated.

As regards our future working, I should say that at the law school we have at this time recently established a class called "Recent Decisions." In this class the students study various cases, especially important ones, which are reported to the entire class, followed by discussion of the legal points involved. It is now the intention of the law school faculty as well as of the students of the Junior Bar Association to combine the activities of this class in recent decisions with the present activities of the bar association and thus conform to the closest degree with the original concept of the junior bar association as laid down by the founder of them, Dean Miller of the University of Southern California.

That is about all I have to say to you. I suppose if I were to make any plea to you today, if that would be proper, I might say we have formed our group with an eye to your group. We have modeled our association after yours somewhat like a child would look up to a parent. I might ask that you look upon this student organization as a parent would look upon a child. We ask you, of course, for no material consideration, but we do ask that you lend us, if you will, your moral support in our student endeavors to better ourselves in what I think is this really new type of legal education.

MR. MURTHA: If I may at this time, in connection with what the young gentleman has just said, I would like to make a comment, and offer a suggestion. I think some of you older men have been neglecting the younger men, if I may put it that way. It is just a comment, not a criticism. I think the reason for it is quite obvious, and that is this—out here in North Dakota we have this very splendid air and good law business, the members of the bar association with their very high standards of living, have not grown very old so they all feel they are still younger members of the bar—as a matter of fact, if some one were to walk in here from some other state, he might think he was mistaken and think this was a meeting of the junior bar association; however, no matter how young you feel, some of these young people have been in the profession only one or two or three years, and perhaps need a little encouragement. My thought is this, couldn't some form of encouragement be found, some means, for these young men to participate to a little greater extent in the work of the State Bar Association and the county bar associations and the city bar association? I thank you.

PRESIDENT FOSTER: If I might state at this time, at the last meeting of the executive committee held following the annual meeting last year, letters were received by me from a gentleman whose name I have forgotten, but a lawyer from Des Moines, Iowa, who was interested and apparently a member of the American Bar Association. His work was to organize a junior bar association either in connection with the state bar association or to perhaps work later on in connection with the American Bar Association. I appointed a committee without

the authority of the executive committee of this association to act upon that proposition and to see what could be done. Mr. Franklin J. W. Van Osdal of Fargo was appointed chairman of the committee and Mr. Aloys Wartner, Junior, of Harvey and a young chap, Adams of Lisbon. I had a letter from Mr. Van Osdal stating he was going to Minneapolis on business and possibly would be back tomorrow. He asked in his letter that the matter be deferred for this year at least. They had not been able to work out the organization they would like and desired to work on it another year. I think the answer to your suggestion has been answered somewhat and I think the State Bar Association has taken some action along the line you suggest, Mr. Murtha.

PRESIDENT FOSTER: The next thing on the program is a paper on the subject "Procedure and Practice" by Prof. S. B. Severson of the University of North Dakota.

MR. SEVERSON: I did not know at the time I was asked to appear on this program that my part was to lead a dicussion on practice and procedure. What I did prepare was a brief description and explanation of the procedure courses in the law school at the University of North Dakota, so you will receive, instead of a discussion, a cross section of the work of the law teacher.

## THE TEACHING OF PROCEDURE IN THE UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW

By S. B. SEVERSON, *Professor of Law,*

*University of North Dakota*

The fact that the members of this Association are almost daily concerned with matters of procedure, may or may not be a good reason for believing that you would be interested in hearing about the procedure courses in the University Law School. At any rate, you will observe that I have chosen the path of least resistance in performing my part of this program, in that I have undertaken to talk about my work,—a thing which almost anyone will gladly do when given the slightest opportunity.

The range and content of procedure courses, and the amount of time allotted to them, vary in the different law schools according to the particular pedagogic viewpoint taken, the needs sought to be met and other factors involved. In any school, courses can be no more than a mere selection, out of a vast store of materials, of those phases deemed most important for the group of students concerned. At North Dakota, the first-year students are required to take a course in Elementary Procedure; the second-year students, Code Pleading and Evidence, and the seniors, Trial Practice, Office Practice, Practice Court, and Criminal Procedure. More time is devoted to procedure in our law school than in that of most other state universities.

In the modern law school the student studies law more by the reading of selected decisions than text books. Obviously some preliminary knowledge of procedure is essential to a thorough understanding of the cases he is required to read. For that reason, most university law schools give some instruction in procedure at the very beginning of the law school course. Just what, and how much, should be made part of the instruction in elementary procedure are matters as to which

views differ. It seems that in some law schools Elementary Procedure is confined to a study of the different forms of action at common law, or the elements of common law pleading; in others, a study of the Actions is supplemented by a preliminary course in Equity; while in still others, it is sought to give the student an even broader survey by combining Actions and elementary Equity with introductory materials in Pleading and Procedure under the Codes. The necessity of adopting the elementary course to the school's procedural program as a whole accounts for some of the variations. At North Dakota, Elementary Procedure consists of a study of selected cases illustrating the common law actions, supplemented by text readings and lectures on the development of those actions and of Equity and of Pleading and Procedure under the Codes. The historical material is believed important not only as an approach to the procedural law but to the substantive law as well. The course also emphasizes such legal terms as are believed likely to arise frequently in the student's case-reading throughout the law school work, and the particular procedural situation which brings a question in a case up for decision by a court of review. The courses in Legal History and Legal Bibliography, also taken by the first-year students, supplement the course in Elementary Procedure on various phases, an example of which is that of Courts and their development and organization in England and this country.

Procedure is continued in the first semester of the second year with a course in Code Pleading, in addition to a course in Equity, which necessarily involves much procedural law. The course in Code Pleading consists of a reading and analysis of the provisions of the Code, and selected cases thereunder, and of a comparison of these cases with leading North Dakota decisions. The characteristics of Common Law and Equity Pleading carried over into the Codes; the principal pleading innovations brought about by the Codes, and the procedural problems created thereby, are noted throughout the course.

In the course in Evidence, taught during the last half of the second year, the study of decisions is carried on according to the same general plan as that in Code Pleading. Local decisions and statutes are noted, and compared with the material assigned from the case-book. In addition to the rules of Evidence proper, this course includes a brief survey of the historical development of the jury and of the several methods employed by judges in controlling the action of juries, as for example, directing verdicts or granting new trials. Various procedures involved in the presenting of evidence, as the Offer, Objection, Ruling and Exception, are also taken up. Thus, to a certain extent, the course serves as an introduction to the senior course in Trial Practice.

Procedure work is continued in the senior year with the courses in Trial Practice and Office Practice, in the first semester, and the courses in Practice Court and Criminal Procedure in the second semester. As Trial Practice, Office Practice and Practice Court are so integrated as virtually to constitute a single course they will be treated together in this discussion.

In general, it may be said that the materials covered in Trial Practice are for the most part those phases of procedural law that are either omitted from, or merely casually treated in, the usual courses in Pleading and Evidence. As studied at North Dakota, the materials covered in

Trial Practice may be grouped under three main divisions. The first is that of Jurisdiction, under which judicial power, and jurisdiction over the subject-matter, person and res are studied; the second deals with Proceedings Based on the Record, including summary judgment, default judgment, judgment on demurrer or motion, demurrer to evidence, judgment notwithstanding the verdict, and arrest of judgment; the third is Proceedings Based on the Trial of Issues, under which are grouped the following topics: continuance, the jury, opening and closing, conduct of counsel, dismissal, nonsuit, directed verdict, instructions, verdicts, new trials, trial by the court, and judgments. These procedures are not taken up precisely in the order here given but are re-arranged for class study in the chronological order in which they take place in the course of a lawsuit, except where a different order seems desirable for pedagogical reasons. The same practice, as in Code Pleading and Evidence, of comparing the basic materials of the course with local law, is followed. Students are expected to familiarize themselves with all important local statutes on procedure, including those on provisional and extraordinary legal remedies, and the various pre-trial procedures. Although the course is mainly concerned with practice in state courts of general jurisdiction, practice in the Federal Courts, and in the courts inferior to our District Court, are incidentally considered. Towards the latter part of the course North Dakota appellate procedure is briefly reviewed by statutes and decisions. The course does not include Probate Practice, as that is covered as a part of the course in Wills and Administration.

The course in Office Practice is taught along with the course in Trial Practice. The former consists of having each member of the class draw, according to a series of assignments, all the procedure papers required to commence an action on a promissory note and carry it through trial and appeal to satisfaction of judgment for plaintiff. In addition to the papers necessary in any such action, those required in the event of default judgment, vacating default judgment, demurrer to the answer, garnishment, taking depositions out of the state, and proceedings supplementary to execution, are included. So far as practicable, each assignment in the series is made at the time when the subject matter with which it deals is being taken up in the Trial Practice class. On the day the papers in a particular assignment are due to be turned in to the instructor, he gives each student a mimeographed set of the papers in the assignment, drawn in accordance with approved forms, for comparison with his own, and a part of the class hour in Trial Practice is devoted to discussion of the problems met by the students in working the exercise.

The courses in Trial and Office Practice are not completed until some time during the second semester. However, most of the materials of those courses have been covered by the beginning of the second semester, and the students are then considered ready to begin the work in Practice Court. In this "court" the instructor acts as judge, the first year students as jurors, the mid-year students as lay-witnesses, and the seniors, in groups of two, as attorneys for the litigants. Clerks, sheriffs, and bailiffs are appointed from among those seniors who are not engaged in the trial of the case. They must acquaint themselves with the statutes relating to their duties. A court stenographer is sometimes available from the School of Commerce;

at other times we get along without one. Expert witnesses are had from the professional and scientific schools in the University. The issues of fact for the practice cases are such as have been actually tried in a court of general jurisdiction. Not all cases thus selected turn out as satisfactory for practice purposes. Those proving suitable are reserved for use from year to year. Of these, there is a sufficient variety to permit the students some choice as to the kinds of cases they wish to try. The jury cases tried during the last school year were: (1) An action for damages to person and property growing out of an automobile collision; defendants setting up a counter-claim; (2) An action to recover the amount on a life insurance policy; defense, fraud; (3) A robbery action tried upon information, the students carrying out all preliminary steps including the hearing before a "magistrate"; (4) A suit in Equity for specific performance of a contract to convey real property; defense, the Statute of Frauds; a jury being called as to the issues of fact.

The jury cases are assigned at the beginning of the second semester. Thereafter the regular class-work in Trial Practice is suspended whenever necessary to permit the class periods to be used for the hearing of demurrers and preliminary motions. Upon completion of a hearing, the subject matter involved is taken up for discussion in class, and the work of the attorneys is criticized by the instructor and students. One week prior to trial, attorneys for both sides must hand in a trial brief covering the evidentiary facts of their case, the anticipated case of the adverse party, and authorities on questions of law which are expected to arise at the trial. In preparing this brief the attorneys are aided by a model trial brief given each student at the beginning of the practice court work. After going over the briefs, the instructor calls the attorneys in for consultation as to any matter requiring assistance.

As soon as the students have tried and completed their jury cases,—usually about the middle of April,—the court cases are assigned. These are prepared and conducted under the same general plan as that of the jury cases, except that, on account of a lack of time, the taking of testimony is usually omitted and the cases are argued to the "court" upon stipulated facts. With a view toward giving the students the widest possible acquaintance with different kinds of proceedings, the court cases are usually selected from among the various Extraordinary Legal Remedies and from Equity.

In many laws schools Practice Court work is omitted altogether. Whether or not it should be a part of the law school curriculum is a question more easily resolved when viewed from the standpoint of the individual law school than from that of legal education generally. Such training seems both necessary and practicable in law schools, like our own, whose graduates expect to go into practice for themselves within the state immediately upon being admitted to the Bar.

The seniors also take Criminal Procedure during the second semester. The method of instruction is the same as that in Trial Practice. The material in the case-book used is arranged in the chronological order in which the proceedings occur but is grouped under the title of the particular official or body of officials whose duties are involved in order to emphasize the administrative features of the problem. The course

begins with the subject of criminal investigation; continues with the usual procedures involved in criminal cases, including methods of review, and concludes with a consideration of pardons and paroles.

MR. FOSTER: Thank you Mr. Severson. At least part of the procedure is practical, because he refers to a counterclaim in an automobile damage case.

I wish to announce again that there are a number of University students who desire rides home, and if any one can take a student some direction he is going, will he please call phone 38 and arrangements will be made.

MR. CAIN: I move you that the report of the Committee on Criminal Law and Procedure be accepted and printed in the proceedings of this Association.

(The motion was seconded, duly submitted, and carried).

## REPORT OF COMMITTEE ON CRIMINAL LAW AND ITS ENFORCEMENT

Your Committee on Criminal Law and Its Enforcement submits the following:

Your Committee is keenly aware of the apparent futility of the adoption of commtitee reports and resolutions directed toward the enactment of legislation to bring about advancement and reform. Experience would indicate that such reports are submitted, debated with some heat, adopted—and forgotten.

At the 1932 Annual Meeting, the Committee on Criminal Law and Procedure, with Attorney General Morris as Chairman, presented an extended report advocating the adoption of a greatly simplified form of information and indictment, and other reforms in criminal procedure. These recommendations were selected from those provisions of the simplified Code of Criminal Procedure prepared by the American Law Institute, the only changes being adaptations of that Code to the situation in North Dakota. After vigorous discussion, the Report was ordered printed, and laid over for further consideration. In the interim before the next Annual Meeting the recommendations were discussed and approved by several local and district bar associations. It was exhaustively considered by the Judicial Council, and approved by that body.

Again in 1933, at Minot, the same Report was presented, and fully discussed. The question being on the adoption of the Report, and for the preparation of a bill in accordance with the Report by the Legislative Committee, the motion was put and carried. (Bar Briefs, December, 1933, page 80.)

Again in 1934, at Bismarck, the same Report was presented. Again the question was put. Again it was carried, and the President was directed to appoint a committee of three to act with the Judicial Council and prepare a bill along the lines suggested by the Report. We understand such a committee was appointed. So far as we know, no such bill was presented to the 1935 Session of the Legislature.

Now, in 1935, there being no regular Session until 1937, your committee again recommends this Report to the serious consideration

of the Bar, and particularly of the local and district bar associations, in the hope that by the time the 1936 Annual Meeting convenes sufficient sentiment may be aroused to secure a vigorous attempt to bring about its passage by the next Legislature. Those who are interested in this Report will find it set forth in full at Page 44 of the December, 1934, Bar Briefs; at Page 16 of the December, 1933, Bar Briefs; and at Page 7 of the Report of the Attorney General for 1930-32.

In 1933, at Minot, we adopted a report of the Committee on Modification of the Jury System, favoring a change in the law so as to permit the defendant, in all criminal cases except murder, to waive a trial by jury and submit his case to the Court. (Bar Briefs, December, 1933, Page 48.)

This Committee recommends activity on the part of this Association to bring about the Legislation approved at our 1933 Meeting.

The American Bar Association at its meeting held in Milwaukee on August 29, 1934, placed Criminal Law and Its Enforcement at the head of its list of activities for the year just past, and its President asked that the various State Associations act particularly upon the following resolutions:

> "Resolution No. II. The American Bar Association recommends the creation, in each state, of a State Department of Justice, headed by the attorney general or by such other officer as may be desirable, whose duty it would be to direct and supervise actively the work of every district attorney, sheriff and law enforcement agency, and who would be specifically charged with the responsibility therefor. This Department would include a central criminal bureau equipped with records and with investigators similar in character and qualifications to those now attached to the Federal Department of Justice. The American Bar Association recommends that the Commissioners on Uniform State Laws be requested to outline an act for the establishment of such State Department of Justice so drawn as to be adaptable to the various state commissions. This recommendation recognizes the necessity in each state for centralization and adoption of modern and non-politically controlled methods of criminal detection and prosecution.
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> Resolution No. IV. The American Bar Association recommends to each state bar association that it formulate improvements in criminal law and procedure and submit them to the courts, the legislatures and the people and that the state associations work for the promulgation of the rules of court where that method is available, and for the enactment of laws and the amendment of the constitutions when the desired improvements can only be accomplished by amendments of statutes or constitutions. It recommends:
>
> (a) that the improvements in criminal procedure be based upon a thorough consideration of the code of Criminal Procedure prepared by the American Law Institute and especially the following provisions contained therein:

1. Giving the accused the privilege of electing whether he shall be tried by a jury or the court alone. (This recommendation has been heretofore considered in this Report.)

2. Permitting the impanelling of alternates or extra jurors to serve in case of the disability or disqualification of any juror during trial. (This recommendation has been carried out in North Dakota by the enactment of Chapter 246, Laws of 1935.)

3. Permitting trial upon information as well as indictment. (This, of course, has long been the practice in North Dakota.)

4. Providing for jury verdicts in criminal cases by less than a unanimous vote except in the case of certain major felonies. (This would require a constitutional amendment in North Dakota.)

It further recommends:

(b) the adoption of the principle that a criminal defendant offering a claim of alibi or insanity in his defense shall be required to give advance notice to the prosecution of this fact and of the circumstances to be offered and that in the absence of such notice a plea of insanity or a defense based on an alibi shall not be permitted upon the trial except in extraordinary cases in the discretion of the judge.

(c) Permitting court and counsel to comment to the jury on the failure of a defendant in a criminal case to testify in his own behalf.

Your committee unanimously favors the enactment into law of each of these reforms which have not yet been carried out in North Dakota, and recommends that these several resolutions be commended to the bar, and particularly to the local and district associations, for study and debate during the ensuing year, in order that definite action may be taken at the 1936 meeting for effective submission of such proposals to the next Session of the Legislature.

Attention is directed to the well-known fact that in a vast majority of our justice courts both criminal trials and preliminary hearings are little more than a farce. Most justices either fawn upon the State's Attorney in the hope of securing more business and more fees, or are prejudiced against him because he does not give them what they consider their just share of the business. The reasons for many of their decisions are shrouded in mystery, and all of us know that the reasons, if any, are not founded in any real and honest analysis of the law and the evidence. Attention is called to the well-known fact that extortion, in mild or exaggerated form, is practiced with impunity by many constables and justices in their conduct of criminal "jurisprudence." The conviction of a justice of the peace and a constable in Ward County recently is one of the rare instances in which this all too frequent practice has been brought to light and justice meted out to the offenders.

Mr. Philip Broen, a graduate student at the University of North Dakota, last year made a survey of the operation of the laws concern-

ing Fines, Forfeitures and Penalties, and his Master's Thesis giving the results of this survey, on file at the University Library, makes some rather startling disclosures:

An examination of the dockets of three Grand Forks County Justices of the Peace, disclosed the following irregularities, appearing with varying frequencies: Fee schedule not followed; no record of fees, costs or fine; case not finally determined; total charge made for fees, without itemization; case tried but nothing reported to County Auditor; defendant enters a plea of guilty, but witness fees are paid; name of defendant omitted from docket; sentence of fine and costs to be paid, but no statement of the amount of either fine or costs; costs added incorrectly; costs and fines listed do not agree with transcript to Clerk of District Court; no plea listed; cases reported as much as three years after the filing of the complaint; "quarterly" reports including periods ranging up to more than two years; search warrant issued, nothing found, defendant not in court, yet a $2 fee for a day in court is charged; "fee for collection" charged in worthless check case—and so on. These irregularities Mr. Broen found by examining the dockets of only three justices of the peace!

The survey also shows that in the three justice courts examined, the reports filed with the County Auditor for the five preceding years disclosed 1302 criminal cases tried, justice fees $7,399.15, witness fees $2,572.75, officer fees $1,577.60, costs $971.65, and fines reported totalling $1,570.70.

During the same five-year period their dockets showed *unreported* 76 cases with justice fees of $346.65, witness fees $61.00, officer fees $354.85 and fines $1,409.50. Notice that the fines in the 1302 reported cases totaled $1,570.70, and in the 76 unreported cases the fines totalled $1,409.50!

That this unwholesome situation is not limited to the affairs of the three Grand Forks County justices examined is evidenced by the fact that Grand Forks County remitted to the State Auditor during the same five years, for fines, penalties and forfeitures from all sources, more than any other County in the State, except Burleigh County. The figures for the five-year total of fines, penalties and forfeitures remitted to the State for the five-year period for the larger counties of the State are as follows: Grand Forks, $7,606.35; Cass, $5,147.70; Ward, $2,446.33; Stutsman, $433.40; Burleigh, $12,411.24; Barnes, $2,179.22. Burleigh County's extraordinarily high total of over twelve thousand dollars is caused by a remittance of $11,845 in 1930, which is not explained in the report.

These figures, coupled with the fact that several counties have not remitted one cent to the state in the past five years (Griggs, McHenry, McLean and Oliver); that many others have remitted either nothing at all or merely nominal amounts for several years, would indicate that it might be wise to conduct a little further investigation into the disposition of the fines, penalties and forfeitures, which, under the constitution, belong to the State School Fund.

At least, the findings of Mr. Broen, in connection with our knowledge, as lawyers, of the vagaries of practice in Justice Courts, make such a picture as to justify a recommendation by this committee that

the members of this Association during the coming year devote serious thought and discussion to the abolition or strict curtailment and regulation of criminal jurisdiction in justice courts.

In passing, we wish to express our approval of the work done by Mr. Broen, and of the practice of the Graduate Division of the University in encouraging practical studies of this nature.

We recommend that this Association take a definite stand against the enactment of new statutes creating new crimes beyond the field embraced by the common law idea of crime. Too many regulatory and licensing statutes have a criminal penalty attached, when the end could be much better accomplished by permitting a suit for the fee due, plus adequate increases for delinquency, and making an exception from the exemption statutes for the collection of such judgments.

The right to issue warrants without approval of the state's attorney should be absolutely eliminated. No prosecution should be commenced without the approval of the state's attorney, or in case he refuses to prosecute, the approval of a trial judge of a court in which the offense might be tried. Emergency cases could be cared for by giving authority to the sheriff or deputy to arrest without warrant, and in such cases the defendant should be forthwith taken before a magistrate and allowed to give bail, and the facts presented to the state's attorney that a proper prosecution may be commenced, if warranted by the facts.

Discord still exists between the State's Attorneys and the Pardon Board. We recognize the almost insurmountable problem which confronts the Pardon Board in its attempt, within a space of a few days, to pass upon from one hundred to two hundred applications for action profoundly affecting human lives. We recognize that the prosecutor and the pardoning authority will probably never see eye to eye upon the question of the proper disposition of applications for clemency. We feel, however, that a better coordination of the work of these two agencies dealing with criminals could be worked out, and we suggest conversations and joint meetings of the appropriate committees of this Association with the Judicial Council and the members of the Pardon Board, to the end that the situation may be improved.

This report commenced with a statement as to the futility of such reports. We do feel that far too often we resolve and adjourn, and never give another thought to our resolutions. We do feel that arrangements for a more effective legislative committee can be developed, and we recommend the serious consideration of ways and means to strengthen our legislative activities.

But however futile our efforts may seem, they are not always in vain. Programs worked out in committee reports, at bar meetings, at the American Law Institute, do very slowly take hold, and eventually appear in our law books. At the 1935 Session of the Legislature several definite reforms in Criminal Procedure were adopted. Chapter 246 authorizes the use of alternate jurors in criminal cases. Chapter 252 provides for the conditional examination of witnesses held to appear before a grand jury or court, when such witnesses are unable to give the security required by the court. Chapter 126 fixes the venue of any crime committed in or against aircraft in flight over this state, in any county of the state, and crimes committed upon railroad trains or other

public vehicles in any county through which the train or vehicle passed during the trip. Chapter 235 permits the use of fidelity and surety companies as sureties upon bail bonds. Chapter 236 authorizes the deposit of money or bonds as bail in criminal cases.

These were made into law largely as a result of the work of the Judicial Council, whose work has been particularly effective.

We recommend the closest cooperation between this Association and the Judicial Council, to the end that each Legislative Session in the future may enact its share of the program of reform in criminal law and procedure, which is the first responsibility of our profession if we are to keep the respect of the public.

Respectfully submitted,
HAROLD D. SHAFT,
A. R. BERGESON
ROBT. W. PALDA.

MR. FOSTER: The report of the Committee on Constitution and By-Laws will be deferred until tomorrow, which apparently leaves only the appointment of the committee on Resolutions and the election of officers for this afternoon. The program has been rather long and we will try to wind it up as soon as possible.

I will appoint on the Committee on Resolutions, Aloys Wartner of Harvey, John Lewis of Minot, and Judge Shaw of Mandan.

The next order of business is the election of officers. The first one, I think, is for President of the Association for next year.

MR. LACY: I have in mind the nomination as President of the State Bar Association of North Dakota a man who is a lawyer in every sense of the word; a man who has reached the stage in life where his judgment is most keen; a man who is not only an able lawyer but a man of public affairs. He is a leader of the Bar of this state and his judgment and services were so valued by the American Bar Association that he has been appointed for years at their various meetings to sit upon various very important committees, and he discharged his duties with credit, not only to himself but to the American Bar Association and also to the credit of the State of North Dakota. He also served his country in war. He has been United States District Attorney, and is, I say, a man amply fitted for the position of President of the Association. He was the only member I know of who was able to get the Cass County Bar Association together so that there was complete harmony, and it never had existed before he was President. I deem it a great honor in nominating for the position of President of the State Bar Association, Melvin A. Hildreth, our present Vice President.

MR. MOSES: Mr. President, I can't but feel that to elevate Colonel Hildreth from the position of Vice President to that of President of this Association is a fitting climax to the long years of service which Colonel Hildreth has given to this state, both in civic and military affairs. Coming as it does at this time of life, I think it is a fitting thing that Colonel Hildreth's splendid ability be given an opportunity to serve the Bar Association of the State of North Dakota for the ensuing year. I am most happy to second the nomination.

MR. FREDRICKS: I don't want to make any other nominations but I would be ungrateful to a long acquaintanceship if I should not take this opportunity of seconding the nomination of Colonel Hildreth to succeed your honor in the chair as the president of this association.

MR. TRAYNOR: I move that the nominations be closed and the Secretary instructed to cast a unanimous ballot for Colonel Hildreth.

(The motion was duly seconded, submitted and carried and the secretary was instructed to cast the unanimous ballot of the Association for Colonel Melvin A. Hildreth for President of this association for the ensuing year.)

SECRETARY TILLOTSON: The ballot has been cast.

PRESIDENT FOSTER: The usual custom is for the elected officer to make a speech at this time.

MR. HILDRETH: Mr. President and gentlemen of the Bar: If any man is happier than I am here at this moment, who after many years in the Bar, over fifty years through good report and through evil report —much evil, have endeavored in my way to aid and support the Bar of North Dakota. During the long years that I have been in the Bar, I have given much of my time and some expense to serve on the General Council of the American Bar Association of which I have been a member for a quarter of a century, but gentlemen of the Bar, I cannot do this job alone. You can have a strong Bar if you help to do the work. I need your help, I want your help. That item of $200 will melt away during my administration but it will melt away in the interest and in behalf of making the Bar of North Dakota a power in this state for the good of the state. I intend, during the time that I am President of your Association, to visit every section in the state and help to organize the lawyers in the different sections of the state. I intend to have something to do with placing young men on the various committees that we have in our association. I intend to devote quite a good deal of my time in your interests, but gentlemen, I need your help; I need your prayers, but if you can't help me and you can't pray for me, keep your fingers out of my hair.

PRESIDENT FOSTER: Next in order comes the nomination for Vice President.

MR. PALDA: I rise to perform what to my notion is one of the most pleasant duties that I have ever had the opportunity of performing. I wish to place in nomination a man who is a real man, a scholarly lawyer, and a friend. I am not going to burden this assembly with any attempted oratory to tell you of his good qualifications because I am not competent, in the first place, and in the second place, we would miss the banquet if I were to tell you the good things I could about the man. I am about to propose for Vice President of this Association—I will make this brief therefore and will nominate for your Vice President a friend of 35 years or thereabouts, a man whom you all know and admire and do not hesitate to address as Charley, which is the best recommendation any man can have. I take pleasure in nominating C. J. Murphy of Grand Forks for your Vice President.

MR. BURTNESS: I don't think Grand Forks Bar Association has, nor do I assume that the unit rule applies, but I do feel safe in saying

this, that if we had a caucus the bar association of Grand Forks County would surely have authorized some one to second the nomination of Charley Murphy. I understand that among the members of the Bar generally there may be some controversy as to whether Charley Murphy is of the shanty Irish class or the Brownstone front class. Be that as it may, I think he will forget his Irish if he is elected vice president and later elevate him to the position of president of this association in due time for I am quite certain that the language which he will use to his subordinate officers, to the executive committee and other committees will be partly Dutch but mostly profane. In any event, we of Grand Forks County not only admire him but we love him as a considerate friend, always willing to help any one who may seek his assistance. His executive ability is unquestioned and perhaps in any of these offices we need a man who can get other people to work rather than do the work himself and he possesses those qualifications to the "nth" degree. It is with pleasure I second his nomination.

MR. BANGS: Mr. President, I might say for the benefit of Mr. Burtness that Charley eats meat on Friday—or I mean fish, so no matter what kind of an Irishman he is doesn't make any difference. I think the greatest and the most complimentary thing which can be said of him is, way back in his younger days he was associated with me and he acquired many of my habits. I have known him ever since he first came to North Dakota. He was assistant United States Attorney under two administrations, both a Democratic and Republican. Now that is some job, too. He is a member of the Bar Board and as Mr. Burtness says, he can do more work sitting in his office and calling some one else over the telephone than any man I ever saw, so that we know he will accomplish a great deal without much effort. I look for Mr. Murphy to be an outstanding—one of the outstanding presidents of this association when he assumes that position. I can't add anything to what Mr. Burtness has said and don't want to take time to add anything except this, that we in Grand Forks who have known Mr. Murphy since he was a boy, we who have practiced law with him during all the years he has practiced law, are in a position to say to you and to the members of this association that there may be other lawyers in North Dakota as good as Mr. Murphy but there are none better. He stands at the very head of his profession. He is an executive of unquestioned ability. He is thoroughly interested in the Bar Association and in the young lawyers of the profession and I feel it is an honor to me and an honor to the association if we can elect him as vice president of this association. I second the nomination.

MR. LAMBERT: Mr. President, I have known Charley for a long while and my thought was to second the nomination, but if he is to forget his Irish, I am against him.

MR. CUTHBERT: I want to speak for the Ramsey County Bar. I have known Charley for a long time. There isn't any lawyer in the State that can write a letter and can say as many mean things as Charley Murphy, and after you learn to know him, you know every one of them is impregnated with kindness and good fellowship. I would rather have deferred speaking on behalf of the Ramsey County Bar to the Lake president, Mr. Traynor, but it seems to me we are getting too

much Irish into this. As a matter of fact any man can live down a stain on his character, and Charley has pretty well lived that down, so I take great pleasure in seconding the nomination.

MR. TRAYNOR: I don't want Mr. Cuthbert to be the only one to speak for the Ramsey County Bar so I rise to move that the nominations be closed and the Secretary instructed to cast the unanimous ballot of the association.

While I am at it, I want to urge you fellows to buy Fred Cuthbert's book. It is one of the best books put out for years and it is right on sale in the lobby.

MR. POLLOCK: I am probably the only man that is honest on the floor today. I wish to second the nomination only for the purpose to say that I along with the rest of the fellows have been licked in every lawsuit I had against Charley Murphy.

FRANCIS MURPHY: I very rarely ever appear at Bar Associations and I very rarely ever make a speech. I want to second this nomination for personal reasons only. I think it is about time that the lawyers of the state will say publicly what they think privately, and if this position of president of the bar association means honoring the man that occupies it, I can think of no one in the State of North Dakota more worthy of being honored than C. J. Murphy. I want to second this for personal reasons, and you and I know he is entitled to be honored.

PRESIDENT FOSTER: The Murphy boys stick together. We have a motion before the house that the nominations be closed. (Several seconds were heard, the motion duly submitted and unanimously carried. and the secretary instructed to cast the ballot.)

SECRETARY TILLOTSON: The ballot is cast.

MR. MURPHY: I would like to inquire if this association is under a dictator. I think the Murphys and a couple of high binders from Fargo have put something over on the association, and it just occurred to them within the last couple of hours or so to do it. I heard a rumor to this effect a little while ago, but I thought it was a practical joke because Pat Murphy, who is responsible for the conspiracy, is always playing practical jokes on me. I had plans made to put in a very pleasant afternoon. I had challenged some of the golf contingent from Fargo and I had visions of making considerable money out of them, these alleged golf players from Fargo, and they knew it, and as the only possible alternative, they decided to put this over on me. Now of course, this is an unexpected honor, something that I never had planned on, and I appreciate it. I fully appreciate the very kind things that have been said about me, but they are not true. I know they are not true, and without particularly impugning the motives of the gentlemen who have been responsible for the remarks, I feel they know just as well as I do what they said isn't true. And then they talk about the future, they talk about the presidency of this organization. Well I am positive that the membership of the bar association will wake up within the next year and that I have now reached the height of my glory. However, as vice president of this organization, and as a member of committees that I will belong to, I will carry on and discharge to the best of my ability the duties that will devolve upon me as vice president.

PRESIDENT FOSTER: The other office remaining is that of Secretary-Treasurer, which is a combined office.

MR. SHAFT: During the past year the executive committee was called upon to fill a vacancy in the office of Secretary-Treasurer caused by the fact that our duly elected Secretary-Treasurer left the state. The executive committee selected a man eminently well fitted to carry out the duties of the office, and for the past few months he has been carrying on more or less those duties as well as being editor of Bar Briefs with credit to himself and the Bar Association, and I take pleasure in nominating to succeed himself our good friend Ben Tillotson.

MR. ELLSWORTH: I think that during the time he has been in service Mr. Tillotson has made a most proficient and satisfactory secretary-treasurer. I am pleased to second his nomination.

MR. WARTNER: I move you that the nominations be closed and that the president of this association cast the unanimous ballot of this association for Ben Tillotson.

(Several seconds were heard, the motion duly submitted and carried and the president cast the unanimous ballot for Mr. Tillotson.)

SECRETARY TILLOTSON: Mr. President and members of the Bar: I can't make a speech. I just want to say I thank you very much for the endorsement and for the opportunity to try during the next year to be a better secretary, quite a bit better secretary than I was during the past. I thank you.

PRESIDENT FOSTER: I think that is all we have on the program until the banquet this evening. We stand adjourned.

## SEPTEMBER 7, 1935

### *Morning Session*

PRESIDENT FOSTER: The meeting will come to order. The first thing on the program is the invocation by Rev. Theodore Leonard.

REV. LEONARD: Let us bow our heads in prayer. Almighty God, our Heavenly Father, we pause to bow before Thee this moment of hesitation and prayer recognizing that Thou hast ordained the laws which govern this wide universe; that Thy laws extend not only to the order of the stars in their course, but ordain certain laws governing the movements of mankind. Grant that we can come ever more into a clearer realization of what those laws are and a growing earnestness of purpose on our part to obey them. Grant, oh God, that a deeper regard and reverence for the processes of law may be established in our hearts; that violence may give way to order; that chaos may be banished from the affairs of men and of nations; may the laws of our legislatures be just, ever more motivated by, and filled with the spirit of brotherhood, of mercy and of an impartial justice. May our administration of them be equal to the necessities and to the opportunities which we have. Hear us in this our prayer. Amen.

PRESIDENT FOSTER: We find that it will be advisable perhaps to make some change in the order of our printed program, and unless there is some serious objection to the same on the part of the members of

the Bar, we are going to have the address by the Honorable George C. Claussen of Iowa this forenoon. We want all the lawyers to hear Judge Claussen and I am rather of the opinion that some of them will probably get anxious to go home this afternoon, and I don't want them to miss that. Neither do I want them to miss the address by Judge Birdzell. I don't know just how it is going to work out yet. We will have to see as we go along, but the first on the program will be the address by Mr. Frank Glotzbach of the Federal Housing Administration.

MR. GLOTZBACH: Members of the North Dakota Bar Association: My subject this morning is going to deal with the various phases of the National Housing Act. To go back and try to draw an interesting picture, I want to take you back to the late days of 1932 and the early days of 1933. At that time a tremendous amount of refinancing was going on in the various agencies in the United States. There was the Home Owners Loan Administration. There was the Farm Credit Administration. There was the Reconstruction Finance Corporation. This refinancing was being done on farms and homes and on industrial property. Along about this time, there were approximately, according to statistics, twelve million people in these United States unemployed. The question arose, where are most of the gentlemen who are employed today, and in what industry have they formerly been employed. A statistical survey showed that of the twelve million unemployed at this time, approximately four million of these individuals have been employed in the building industry and allied associations. Naturally to get down to the root of the evil, the thought came, what can be done to stimulate the building trades in our country.

The little country of England whose population is only forty million compared with our population of one hundred thirty million had built four times as many homes in 1933 as we had in this country. I really believe the reason was due to the fact they had a housing administration sponsored by their government. Our administration in this country of the Housing Act differs slightly from Sweden, Norway and various other European countries. In this country the Administration advances no funds. It is purely the idea behind this Arministration, or the Housing Act, to get private funds back in the business, not to get government into business, but keep government out of business.

When the statistics were taken, they found out that the building industry had fallen off 95% in its volume of what had been done in 1928 and 1929 during the more prosperous period. The first move in order to get an organization immediately so as to start to function was to take one of the organizations already set up and engage in a campaign of publicity. An attempt was made to get the people in a mood of home mindedness.

The first phase of the program dealt strictly with modernization and repair. One phase which was set up and incidentally perhaps the most misunderstood phase is the rate at which this program is put over, that is $5 a hundred. That is not to be thought of in terms of interest because the whole thought behind this part of the program is in terms of buying for cash against time. Unquestionably the rate of $5 a hundred which includes every charge, the initial service charge and all types of fees which might be otherwise put in a loan of that

nature is very reasonable. These loans can be made for a period of one to five years. They are strictly based upon character risk basis. It has been found since the administration has been founded, and it has operated approximately one year now, that in all the loans made in the case of the housing program, there has been approximately one-eighth of one per cent delinquency. In North Dakota where I can speak accurately, in $250,000 worth of loans issued by the housing administration we have as yet to find in our state one single delinquency. We are mighty proud of that record. It goes to show that when confidence is put back in the people, they will react. There has been an amendment written to the first part of the act which now includes loans up to $50,000 on industrial property, that is for conversion of business property in departments, furnishing equipment and machinery, etc. This probably will not help us to any great extent in North Dakota, as it will in some of the industrial centers in the east. Nevertheless we have been able to finance three loans in the State of North Dakota falling under the amendment which otherwise had no possible chance of being financed.

The second phase of the act which comes closer to the average individual in this state deals with mortgages. Under this part of the act an individual or corporation or cooperative builder may refinance existing mortgages. Under this part of the act the interest rate is five per cent and one-half of one per cent service charge; that is, loans are all based on the monthly basis over a period of from one to twenty years, varying, of course, with different conditions in each individual case. The rate is five per cent plus one-half of one per cent service charge which the individual pays for making loans and going through the effort of setting up a separate individual bookkeeping system to collect the whole charge. This part of the act has given North Dakota, I believe, a tremendous break. The thought which first came out was, what shall be the interest rate in the different states of the United States? In the east they always had lower rates than we have had in the west. It was thought that possibly a lower rate on the housing proposition than we had was needed and a rate was set equally throughout the United States of five per cent. This really gives the North Dakotan a tremendous break.

Another thing which this act has done, especially in North Dakota, is this; in the City of Grand Forks, I was told yesterday it had stiffened prices on real estate. We find in this town on close survey of statistics that real estate in Grand Forks today has generally increased in price and that buildings of any type and condition are rented. That is a mighty fine condition, but the main thought still lying back of it is the fact that we are trying to stimulate this new construction, because of every dollar that is spent for new construction, sixty cents of that goes back into labor.

We have in our office today $800,000 worth of applications which is a tremendous amount when you stop to think that it has only been three months since we have been able to get this type of loans on the amortization basis.

The appraisers who are picked on this job are unbiased and non partisan and must have had past experience in real estate values. They are given special training again in modern methods of appraisal. We

have found in every place these men have gone that they have proven very satisfactory to the home owner and they have proven very satisfactory to the financial institutions who after all are making these loans. On this type of loan, the government through its one-half of one per cent service charge which is made is assuring the financial institution of one hundred per cent of the amount of the loans. As you recall, previously in this state on real estate loans fifty per cent was considered the top. We used to go into a four or five year contract on a $4,000 mortgage knowing at the start of the contract that you had no possibility or ways or means of paying on that obligation in that period of four or five years, which then came right back to the question of inferior refinancing, second and third mortgages, and eventually foreclosure. Today the thought behind this program is eighty per cent appraisal, that the individual will be completely covered from the start of his loan, and that this loan will be set up in accord with the average individual's income.

We feel that the businessman and people of the state ought to and will take advantage of this act and we will be able to put on a building boom as soon as times get in a position where it is logical. In the City of Bismarck today, which has throughout this state been the low point in new construction, the figures on building permits run one hundred per cent over 1934. It makes you stop and think when you consider that as late as in March 1933 the building industry was absolutely at a standstill all over this country outside of the public works and the building program put on by the government. There were no homes built; but I know of many instances in North Dakota where homes have been built this year, the first one to be built in over a period of many years. Whether this is due to certain conditions or due to stimulation, is questionable, but nevertheless in my mind I am convinced that the power of suggestion, especially toward the home, the one ideal which the average individual has, has helped us put over this program in this state.

I am glad to have the opportunity this morning to talk to the North Dakota Bar Association. It has been a pleasure to me to be here this morning to present our program to you gentlemen.

PRESIDENT FOSTER: Mr. Owen, I am going to ask you to present the next feature on the program, if you will.

MR. OWEN: Mr. President and friends: Yesterday the President of the Board of City Commissioners sent an official welcome to you, and in that welcome he mentioned the fact that Grand Forks was proud of its institutions, of its homes, and of the kind of people that make up our city.

We are very proud and pleased today to bring you a girl who has been raised in our community. She is a product of our public school system, a graduate of Wesley College Conservatory, and of the University of North Dakota. Her ability has been so outstanding that she has been honored by scholarships in eastern schools, and very shortly she goes east to continue her studies. Mrs. Sorenson, her accompanist, is also a local girl. We are very proud of them and it is with a great deal of pleasure and pride as a citizen of the community and as a member of the Bar Association we present to you Karen Margaret Olson.

(Singing of a group of three numbers and encore by Miss Olson were enjoyed.)

PRESIDENT FOSTER: Miss Olson, I want you to know that the Bar Association of North Dakota appreciates the program you have given us. It has been very generous and it has been very lovely and we all thank you very much.

I have been asked to announce that the alumni of North Dakota will have a luncheon at the Belmont Cafe at 12:30. The committee in charge of this luncheon would like to have all who will attend raise their hands so they can be counted.

A number of years ago I knew a young man in Iowa who was a hard working mail clerk on the Milwaukee Railroad. I had lost track of him for a good many years. At that time he was my friend. I hadn't heard of him for a good many years but this year I wrote to the Honorable George Claussen of Clinton, Iowa, asking him if he would appear upon our program. He had been a Chief Justice of the Supreme Court of Iowa but the Democrats got him as they got many a good man in the course of time, one of the unfortunate things in the political game. In my letter I asked him if he were the same person that I knew at Monticello and he said he was, so it is an added pleasure to me to introduce to you this morning the Honorable George C. Claussen, former Justice of the Supreme Court of that state. I present Judge Claussen.

MR. CLAUSSEN: My brothers and members of the Bar, ladies and gentlemen: It would be a source of real pleasure to address the Bar Association of a great state independent of the fact that the President of the Association happened to be an old boyhood friend. No man can come before a gathering of this kind without being conscious of the courtesy which is extended to him. I had anticipated the privilege of addressing you this afternoon, when perhaps I might have had a little more time to run over the matter which I desire to discuss, but perhaps it is just as well that we have time this morning. I attended the Bar banquet which you had last night, and I there drew from the remarks which were made that the questions of what the Constitution means and to whom it belongs have already been injected into the proceedings of this meeting. There are certain aspects of the subject upon which I speak which might be as controversial as are either of the other questions, and rather than take the subject matter and handle it as I had intended by browsing around over it and giving a little warmth and color to it, which is rather a drab subject, I have concluded to stick literally to the text, and if you will bear with me while I read my few remarks, I will assure you that in return for the matter being somewhat more dry in that respect, it will be more brief and perhaps less offensive. The President didn't announce the subject. I desire to speak on "The Futility of Law."

## THE FUTILITY OF LAW

Man assumes that his brother is called to a high destiny and conceives it to be his duty to see that such destiny is achieved. He seeks to perform this duty largely through the enactment of laws. He has faith in law but his faith in his laws is peculiar, it is great in prospect, it is little in restrospect. He directs a law against an evil in the sure faith that the evil is thus doomed, but he has no faith in existing laws to eradicate the evils at which they were aimed. He has been disillusioned concerning the efficiency of the laws he now has, and it would seem that he should

begin to suspect that there is a limit beyond which his law may not go. But man is optimistic. He keeps on trying and his efforts are always directed toward the enactment of more laws.

From early childhood to the grave we are impressed by the certainty of the operation of the laws of nature. As we grow older we are impressed by the failures of the lawmakers of the past. In a general sense the certainty of the operation of the laws of nature is brought into contrast with the uncertainty of the operation of the laws of man, and instead of suggesting the existence of certain insurmountable obstacles to the attainment of our ends through law, the contrast leads us to strive on in the quest for laws that will bring to us the social order of our dreams. We visualize existence in a society in which conventions are universally observed and law is always obeyed. When we begin the task of converting our dreams into realities we find that conventions must be established by law and that obedience to law must be enforced by law. And still we reason, if nature can enforce obedience to her law and thus achieve the perfection of the universe, why cannot man enforce obedience to his law and thus achieve the perfection of his dreams?

The answer is not hard to find.

It may be that there are no laws in nature. But, if there are, such laws are but the attributes of the forces, the matter and space that make up the universe. Every force and every particle of matter takes with it ever its own attributes and its own compulsions. In every change, the characteristics of the old order are destroyed in the process of change and the new order takes on its inescapable attributes. Nature does not need one law to enforce another. She imposes no sanctions and gives no rewards. But on the other hand she only requires that her myriad subjects be themselves,—that they behave according to their nature. Under their law they need only be themselves. All things in nature seem to be so constituted that they must be destroyed so that a new order may have its day and the process of creation proceed, but this process of destruction and regeneration is strictly incident to the attributes of the forces, the matter and space which comprise the universe. There seems to be no law of nature that can be violated, and this is due to the fact that force and matter and space have with them ever their own attributes and their own compulsions.

Man, the egotist and the optimist, is not as reasonable as Madam Nature. He is not content that his brother shall be himself, or behave according to his nature. The law of man does not contemplate that the individual shall act under the compulsion of his own attributes. Man contemplates that his brethern shall restrain their natural impulses and conform their actions to conventions established by the law. In nature each thing is itself, but under the law, man may seldom, if ever, be himself. And this brings us to the fundamental cause of the futility of our law.

The law of man never becomes a part of man. I know of no law that is a statement of an attribute of man, and so is ever inescapably with him. And because this is true there is no law of man which cannot be violated. The laws of nature are in nature. There is no situation in which they do not execute themselves. But the laws of man are not in man. No one has yet devised the means whereby the law may break down the citadel of the mind and so bring under its dominion the

activating power of man. The law may punish and reward. Within limits the law may stay my hand. Within limits the law may compel me to act. But law or no law, my mind functions as it pleases. Without let or hindrance it entertains its likes and dislikes; it draws its own conclusions; it has its own conceptions of right and wrong. It gives me my ambitions, it encourages me either in slothfulness or in habits of thrift. It maintains its communion with the Deity in the manner dictated by it. It is the engine that drives me on. And so it is with you. A stubborn and primordial hope leads us to believe that even in death we shall maintain the integrity of the spirit which lives in our mind. How, then, shall the law invade the mind and make it over? How shall the law prevail in the task that requires that the mind of man—his very nature—be made over?

In a general sense laws determining property rights, regulating the making and enforcement of contracts, defining crimes and prescribing their punishment, regulating domestic relations and the rights and obligations that exist independent of property or contract, and generally regulating human affairs, are prospective in operation. But we encounter these laws largely as we reckon for the past. In the courts we deal generally with the dead past. We impose penalties, and give rewards for things that have been done. The laws may not be perfect, but they work. In so far as the law clears away the wreckage of our yesterdays it is not futile, it is a necessary and effective 'wrecking crew.'

When, however, we endeavor to use law as a constructive agency—as a power to compel man to be other than he is—we enter into the field of futile law.

Human law is, of course, the mandate of constituted authority. It is a rule of conduct. It is that which gives rights. But it is ever the mandate of power. When the power which decreed the law is destroyed, the law is gone. Out of the beginning of time there has been no change in the essential characteristic of the law, that law is law, only in virtue of the power that makes it. Whether the law be given by priest or emperor or dictator, or whether it be enacted in council, in Parliament, in Congress or in a legislature, or whether it flow from the pronouncements of the courts, there is no magic in it that ingrains it in human nature merely because it thus becomes the law. In so far as the law may differ radically with the active instincts, as differentiated from the ideals of men, its power to bind depends on the power of its maker to punish its disobedience and to reward compliance with it. No legislative power has ever been devised that can long punish all its subjects or that has the ability to long reward all who may be subject to its laws, for power to punish depends upon physical power and one can be rewarded only with that which is taken from another. Punishment, universally inflicted, results in successful rebellion, and universal rewards lead to certain bankruptcy. Inevitably, then, the law must closely conform to human nature as it is, and may not follow the ideal, nor its antithesis, far afield, for in either extremity man will not obey it willingly and the power to enforce it does not exist. Laws which deviate much from human nature are oppressive. Sustained obedience to them requires an impossible effort. They meet the opposition of the actual inner self of the people.

The protective device of the people against such law is a resort to the illicit. Man has had illicit religions. He has stolen. He has

poached. He has smuggled. He has had Sunday baseball,—and cigarettes and prize fights. He has had quantities of illicit liquor. France supplies us with an instance in which the people of a nation have had an illicit currency, and many people have had illicit governments. Nowadays we call the first aid of the people against such laws a bootlegger, and today we have "bootleg" everything and innumerable "bootleg" organizations and societies. These are, apparently, the normal reaction of man against being made over through laws which in truth can only leave him as he is—beset with the vices and frailties with which he came into the world.

The immorality and spiritual heresy that reside within us have survived the onslaughts of a thousand years of lawmaking. To the man who surveys the situation candidly and without prejudice, it is obvious that neither probity nor spiritual excellence can be brought about through law. They are attainments of the people achieved through endeavor, and never through the law. There are, however, still other fields in which the law is entirely futile.

Most people associate freedom and liberty with the natural order of events, and think that they come to people under and in virtue of law. Theoretically, to live in freedom and with liberty may be the natural condition of man. But in the world in which we live such is not the natural order of things. We know nothing of the beginning, but as far back as the records enable us to see, freedom and liberty, rather than being the accepted and established order, are conspicuous through their utter absence. Neither have freedom and liberty come through the law, nor have they been held to the end in virtue of law. In the beginning they came in spite of the law and in many lands they have been lost notwithstanding the law.

The struggle for freedom and liberty seems to be as old as the race of man. The end of the struggle would have been achieved long ago were it not for the fact that these things are difficult of achievement and are easily lost. The charter of liberty of the English speaking peoples, the Magna Charta, was signed on a field set for battle. It was the culmination of a long chain of events. The rights and liberties recognized in the Magna Charta were earned through the long struggle and were achieved before the Magna Charta was signed by King John. The Magna Charta has been confirmed by Parliament on many occasions,—the events at Runnymede, and those that came before, have been reflected in the laws of England,—still freedom and liberty came to England, not through the Magna Charta, but rather through the events that forced the reluctant king to sign the historic grant of liberty. In fact in this instance, liberty came in spite of the law for the power which denied these rights was established in the law.

We associate our own liberties with the events of the Revolutionary period—with the Declaration of Independence and the Constitution. But under the law, our forefathers of the Colonies were subjects of King George, at the time the Declaration of Independence was signed. It required seven years of war to make independence an accomplished fact. Liberty did not come to us under the law, it came in spite of the law. Liberty came to us at Yorktown. Freedom was there achieved.

Runnymede is reflected in the laws of England, and Yorktown in the Constitution and laws of our nation, and the events of every nation

giving freedom and liberty and democratic government to its people are reflected in the laws of such nations. But freedom and liberty have never come through law. Far more dynamic forces than the law-making power of man are involved in the achievement of liberty and freedom, and mightier powers are involved in their loss.

Some years ago the world engaged in a vast struggle at arms, said by a great President of our nation to be a struggle to make the world safe for democracy. The events attending the conduct of the struggle and its close seemed to justify the designation, for the archives of the contending powers were filled with the abdications of kings and the statute books were crowded full of laws giving liberty and freedom in government. So, in a legal sense, first came liberty and freedom in government to many peoples, and those already enjoying a measure of freedom were apparently made more secure in such enjoyment through the destruction of despotic government. Here then was liberty in virtue of law. How long was liberty held, that was achieved through the law? How inviolable was liberty in virtue of the law? From the snows that never melt, to the lands that know no winter, the peoples of Europe toil today in the misery of their lost freedom. The great war, rather than making the world safe for democracy, has left the wold with more people subject to arbitrary and despotic government, than ever before in its long history. But it has demonstrated conclusively that freedom does not come in the beginning through law, and cannot be held until the end in virtue of law alone.

Liberty and freedom like morality and spiritual excellence are attainments of people, dearly gained, and held only through jealous and eternal vigilance.

I inquire as to what freedom and liberty may be. What may a free people do? They have apparently but one complete liberty. They may completely fritter away and abandon their freedom, but in every other field of endeavor they are restrained by nature's immutable laws. Man is himself a product of creation, of nature if you please, and as we know, cannot make himself over and cannot be made over. Neither can man do more than scratch at the face of the earth, nor more than slightly modify its plant and animal life. Builded out of the most minute particles of matter and infinitely small units of energy, the form of the mighty universe raises itself all around us to excite our admiration when we pause to gaze upon it, and to subdue us in awe of its Builder when we consider the sublimity of its perfection. Although builded in its entirety out of tiny units, the vast structure has its orderly processes and its immutable law. Scattered over the face of the earth are the hundreds of millions of human beings that constitute a little world of their own. We must admit, even though we do so reluctantly, that there is natural law in this world of human beings. Even as the units of matter and energy are swallowed up in the physical universe, so the acts and desires and perversities of the individual, differing vastly as they do, are swallowed up in the activities of the multitude and the world of men moves under unchanging laws.

Our economic structure is no more and no less than the intermingled mass of humanity and the things of the earth that man has been able to appropriate to his uses.

It is toward the economic structure of the world that the lawmakers of the world are now directing their efforts, regardless of whether such lawmaking power is in the hands of dictators or of the people. In every generation of men the consequences of the operation of economic laws have been reflected in untold misery and despair. It is these consequences that all men seek to escape. To those of us who can see in the economic world great natural laws, the thought occurs that such laws, like other natural laws, cannot be violated. The thought occurs that such laws are operative no matter what may be done, and the question naturally arises whether laws made by dictators or free men can stay the operation of the natural economic laws. I suspect that the future will produce more futile laws directed against the operation of natural economic law than were, in all the past, directed toward the attainment of freedom, liberty and morality.

At the present time men, who claim they know how to figure, are at each others throats on the question whether Newton's law of gravitation or Einstein's relativity is really the law of nature. To the man who falls off a ladder or a scaffold, it really makes no difference whether Newton or Einstein is right. A proper understanding of a proper statement of the law that pulls him to the earth with disastrous consequences, is not essential to its operation. The struggle between the mathematicians is a very small show, by the side of the one that is now being held on economic law. There are but few mathematicians, but every man is an economist. Unfortunately the economic forces will operate regardless of whether they are known, or understood or the law of their operation properly stated, exactly the same as the force that pulls the falling man to the ground. The mathematicians are, on the whole, the more reasonable, for neither school of thought advocates that any devotee of their art place himself in a position where the forces under inquiry can produce disastrous consequences. They know the force will work. But the economist law giver assumes that he can stay the operation of economic forces and insists on placing the human beings under his power in a position where, if the natural law has not been stayed, disastrous consequences will result.

I shall not burden you with a summary of the economic laws. I have a sincere desire to return to my son in Iowa. I do know that under natural laws there is such a thing as credit, elusive though it may be, and I do know that there is such a thing as value. I do know that people are not actuated solely by reason in their tastes, desires, likes and dislikes, and that their wants are not limited by necessity. I do not know at what place shiftlessness shades into industry and thrift, nor where these in turn shade into avarice and greed. I do not know at what point ambition becomes overweening. Still all of these considerations determine the worth of things in this world, and in a large measure the abundance of all things, and each man's possessions. The cumulative effect of a multitude of similar considerations is economic law, and by such law is determined the worth and abundance of wealth and its ultimate distribution. Worth cannot be created by law nor can wealth in abundance be legislated into existence, for worth and abundance are the product of natural economic law. Neither can wealth be redistributed by law for the distribution of wealth is likewise the result of economic law. We may enact that a thing of no worth shall have value, and for a time, deal with it in our play world, the world of legisla-

tive creation, as if the worthless thing had value, but ultimately the law of reality will reveal that our treasure is dross. We may legislate that all men shall live in abundance, and in our play world, we may for a short time have abundance, but ultimately the law of reality will destroy the legislative illusion and we will be poor indeed. We may take from him who has and give to him who has not. Under natural economic law this process is in eternal operation. But when we take from him who has to give without heed or discrimination to him who has not, we dispossess and dispose of wealth in disregard of natural economic law and we find that the wealth so taken and so disposed of, is sunk in the insatiable maw of nature's economic law. We are, I fear, destined to see the wealth of the world destroyed in the clash of our futile laws with the natural economic laws of the world of men.

I conclude that neither morality, nor freedom, nor liberty, nor economic stability and competency can be achieved through law; that all such, to be had, must be achieved by struggle, and can be held only through vigilance and constant effort.

I lean strongly to the belief that our inability to enforce our laws and to more profoundly influence our destiny by legislation is, in its broader aspects, the greatest blessing of mankind. I am led inevitably to the conclusion that human progress has taken place only because man has been unable to get away from his own nature and the restraints of this world. In the laws of every age and among every people we find a reflection of their wickedness and idealism. We are dismayed because we cannot enforce upon our brethren the idealism of today. But I wonder whether such power of enforcement would not be the end of progress. I know that the only way in which we could enforce our idealism would be by smashing down the peculiar individualism of man and making his nature over, and when this has been done I am at a loss to know from whence the idealism of the future will come. I do not see how we could have escaped from the conditions of antiquity if the order of that day had been ingrained in human nature and I do not see how man could escape from the order of today if we forced it on him so that it became a part of his very nature.

Somehow or other I retain my faith in the handiwork of the Creator. Somehow or other it seems to me our laws are futile for our own good. I console myself in the perverseness of man with the laws of man in the belief that this very perverseness is the guaranty of the Creator that man shall ever progress. And in the strength of this belief I am not alarmed because we cannot legislate care into the careless, integrity into the dishonest, love into the hearts of those who hate, wisdom and understanding into the fool, forthrightness into the knave, and Christian charity into all.

MR. LIBBY: I move that this Bar Association assembled here extend to his honor, the Judge, a vote of thanks for the wonderful address to which we have just listened.

(Motion was duly seconded, submitted and carried by a rising vote.)

MR. NOSTDAL: I also move that Judge Claussen be elected an honorary member of the North Dakota Bar Association.

MR. WARTNER: Second the motion. (The motion was duly put and carried.)

MR. CLAUSSEN: Without more ado I wish merely to state the fact that I want to express my appreciation of the great honor which this great association has done to me, and the hope that as I conduct myself before the Bench and before the Bar of Iowa, this association may never have regrets for the signal honor conferred upon me.

PRESIDENT FOSTER: We have some committee reports. The first on the program is the report of the Committee on the Modification of the Jury System. Judge Grimson—

JUDGE GRIMSON: Mr. President and members of the Bar Association:

## REPORT OF COMMITTEE ON MODIFICATION OF JURY SYSTEM

Your committee on modification of the jury system submits the following report:

We have endeavored to make some study of the jury system, its history, development and modern trends. It probably is not within the scope of this report to go into its history. It seems to have developed even before the Magna Charta, from a custom of calling those from the neighborhood of the controversy to testify as to the facts thereof and to say what was the truth in regard thereto (vere dictum). This developed later into the system of having the jurors determine the facts of the controversy from witnesses rather than from their own knowledge. Just how the number twelve was chosen seems doubtful. Unanimity for a verdict does not seem always to have obtained. It seems however that some system of jury determination of the facts has spread over most civilized nations and is regarded in criminal procedure as a safeguard for the liberty of the individual.

Perhaps because of the attitude of the English courts and the British Government, the jury system became more thoroughly ingrained in the government of the colonies and later of the United States than in many other countries. The jury stood as the protector of the rights of the individual. It came to be considered an inalienable privilege and was held in great esteem by the American colonists. Thus it became imbedded in the constitutional provisions of the different states.

In recent years there has been more or less criticism of the jury system. The western states have in their constitutions made some changes in the original concept of the system and have introduced some innovations. It is clear, however, that the jury system is still dear to the hearts of the American people; that rather than attempt to abolish it, the changes have been in an attempt to overcome its deficiencies and make it an instrument for the protection of the rights of the people as it was originally and always has aimed to be.

The most general criticisms have been with regard to the calibre of the jurors, the method of selection, the cumbersomeness and expense and the requirement as to unanimity. It is claimed that the system is out-worn; that it has not progressed in unison with the progress of science and enlightenment; that the waiver of a jury and the determination of issues by a court of judges would secure better results.

Your committee is unanimous in its belief in the jury system. It recognizes however that some improvements may be made. The jury

system has developed as the needs of humanity seem to have required. There is no reason why, with the modern change in relations between man and man, it may not still be developed so as to be a more perfect instrument of justice.

Your committee has therefore decided to consider some of these criticisms with a view of coming to a conclusion as to what modification if any of the jury system is necessary to overcome them.

## CALIBRE AND SELECTION OF JURORS

When we examine the criticism with regard to the calibre of jurors, it is found that the root thereof exists in the manner of their selection, in the exemptions granted to certain classes and the general failure of realization by those who make up the jury lists of the importance of the office of a juror.

An examination of the statutes of the various states shows that jurors are selected by various boards created in different ways,—from the appointment of such boards in Louisiana by the governor thereof to the selection thereof by the voters, as prevails in our state, where the boards of the various muncipalities are required to perform that duty. Invariably the calibre of the jury depends upon the fidelity with which these boards perform their duty. In some states the boards are hampered by exemptions of large, intelligent classes of citizens. Generally ministers, doctors, county officers, pharmacists and firemen are exempted. To this list has been added in many states other classes because of the pressure of these classes on the legislators. For instance, in New York all persons engaged in "glass, cotton, woolen or iron manufacture" are exempted. In some states optometrists, dentists, undertakers, professors, tutors, pupils of public seminaries, custom house officials, postmasters, marines, superintendents and servants in hospitals, members of the National Guard, teachers in public schools, growers of fruit, grain, potatoes and tobacco while engaged in securing or gathering their crops, are also exempted. It will be seen that these exemptions remove a very desirable class of citizens from jury duty and necessarily lower the calibre of the average jury.

In our state, however, we are fortunate in that the absolute exemptions from jury duty are limited to judges, sheriffs, coroners, jailers, attorneys and those subject to bodily infirmity amounting to a disability, or who have been convicted of a penitentiary offense. While many other classes enumerated in Section 814, 1925 Supplement, cannot be compelled to serve, yet there is no reason why they cannot be asked to perform that duty of citizenship. Experience shows that when the importance of the office is called to the attention of men of that calibre they waive their exemptions and sacrifice their own time and convenience to serve for the good of their country in the administration of justice and are glad to perform that high duty of citizenship.

There has undoubtedly existed amongst the local boards in our state ignorance of the law governing the matter of selection of jurors and further a belief that the jury duty could as well be performed by those who had nothing of importance to attend to, those who had the most time, perhaps because of failure of their own business enterprises, and because of a hesitancy to force upon the busy, successful man the burden of jury duty. Thus we often find "repeaters" in jury service and per-

haps men of less than average ability. It seems doubtful if the boards always select the jurors from the resident tax payers of the district as provided by Section 820, C. L. N. D., 1913, or that they have such tax payers serve in rotation, as is the intent of the law. The township manuals which most boards use for a guide do not seem to contain an adequate, brief statement of the law and of the importance of jury duty.

Many years ago while states attorney of one of the larger counties of this state, one member of this committee sent out a letter to the various boards of his county explaining the law and stating the importance of jury duty. It was noticeable that for a long time thereafter no "repeaters" appeared in that county and some of the busiest and most substantial citizens of the county were drawn for jury service, and gladly served in spite of personal loss and inconvenience.

Some years ago Judges Lembke, Berry and Pugh of the Sixth Judicial District had printed a four-page circular entitled "How the Jury Should be Drawn", and distributed it amongst the various boards of the counties in their district. It would seem that such a circular available for distribution throughout the state would be of great help in this matter. There is no doubt of the honesty and good-faith of the boards in drawing names for jury duty. The trouble lies in their lack of knowledge of the law and the lack of realization of the importance of the work.

In this connection it is also worthy of note that in the state of Maine a pamphlet has been issued from the attorney general's office entitled "Circular for Trial Jurors." This circular takes up by questions and answers the duties of a trial juror and explains much of the procedure he will observe in court. Apparently this circular is then sent out with the notice summoning the jurors. It gives the prospective juror an opportunity to post himself not only on the methods and procedure of court, with which the average juror is absolutely unacquainted, but also on his duties and on the importance of the work of the jury in our system of administration of justice.

Copies of the two circulars referred to are attached to this report.

In the opinion of your committee, no modification of the jury system is necessary to obviate this criticism of the calibre of jurors. What is needed is rather the elimination of exemptions from jury duty and the education of boards selecting the jury lists. If they realize the intent of the law and the importance of the office, the result will be the selection of intelligent, responsible men, men to whom the jury boards would be willing to submit their own affairs if in controversy. A further aid would be the education of the prospective juror, so that he understands procedure in court and realizes his duties.

## UNANIMITY AND NUMBER

The criticism regarding the cumbersomeness and expense of the jury system is leveled largely at the number and unanimity required. It is said that twelve is an unnecessarily large number and further that to require a unanimous decision enables one man to cause a mistrial and further expense in the matter. It is pointed out that this is a government of majorities; that the President of the United States can be impeached by a two-thirds vote in the senate, while the humblest citizen

cannot be convicted of the slightest misdemeanor without a unanimous verdict of a jury. Our courts pass upon the highest and most intricate questions of national import by a bare majority. Yet a unanimous decision is required to settle a dispute of a few dollars between neighbors. It is true that often a unanimous verdict is reached by compromise; that many jurors vote for such a verdict with mental reservations. Probably the strong men of the jury control and if there happens to be a division in the ranks of the strong men, a disagreement may result.

The trend with regard to this matter seems to be the abandonment of the idea of unanimity. In 1932 sixteen states did not require a unanimous verdict in civil cases and six abolished unanimity in misdemeanor cases.

Then too, the tendency seems to be towards a lesser number than twelve. In 1932 eighteen states had lowered the number save in felony cases.

It seems the argument for a reduced number is speedier trials and less expense.

Our supreme court in the case of Power versus Williams, 53 N. D. 54, 205 N. W. Y. held that under our constitution and the laws in force when it was adopted, the unanimous concurrence of twelve jurors is guaranteed. To make any change in that matter therefore, a constitutional amendment will be necessary.

The committee secured the assistance of Dean O. H. Thormodsgard of the University of North Dakota Law School, and filed herewith is a very carefully prepared article on the constitutional changes required in modifying jury trials in North Dakota, prepared by Mr. Charles J. Carter, a senior law student, under the direction of Prof. S. B. Severson of the University of North Dakota Law School.

This article clearly points out the necessity of a constitutional change if the number and unanimity are to be changed, and cites authorities. It also reviews the changes made with regard to these subjects in other states, showing that there is a tendency to a lesser number of jurors and verdicts by less than a unanimous decision.

Your committee is of the opinion that under present conditions and the enlightened state of the public mind, an amendment of our laws to provide for a five-sixth verdict and a jury of less than twelve in cases of lesser importance will be an improvement on our present jury system. The system then will be less cumbersome and we believe such a change will make for speedier and less expensive trials. It would provide for a sufficient decorum and consideration to insure justice. We do not believe that, with the present condition of public education in our state, there is any danger of oppression from the majority nor any need now of unanimity of the jury in order to protect the citizen in his property, liberty or life.

A jury of six in cases of amounts of say under $500.00 and in cases of misdemeanors would seem to be sufficient to assure a just administration in connection with such matters. Such a jury guaranteed an individual without cost to him would be his protection; at the same time a great saving for the public in time and money in the disposition of such matters of lesser importance would result.

## ALTERNATE JURORS

North Dakota is amongst the many states who have recently made provision for alternate jurors in cases that are liable to be protracted. Our statute, Chapter 246 of the 1935 Session Laws, is however, applicable only to criminal cases. Some states have made such provision applicable to civil cases also. The theory is that if one juror becomes sick or unable to continue on a case, the alternate, who is chosen like the other jurors and sits with them throughout the trial, shall take his place. It is true that in civil cases the parties to the action may by stipulation submit the matter to a jury of eleven or less but there is no way to compel them to do so. Unless the parties are willing to so stipulate the trial would have to be had over again if anything happened to a juror before the verdict is rendered. Many civil cases last for several days, and to have to commence over again would often be considerable expense, delay and trouble. There usually are many members on the panel in addition to the twelve serving on a particular case. The alternate juror would, therefore, ordinarily be no additional expense, but would be an assurance of the termination of a cause after it is once started. It seems to your committee, therefore, that the provision for alternate jurors should be extended to civil cases.

## WAIVER OF JURY TRIAL

A study of modern trends in the jury system shows that there is a growing tendency towards providing for a waiver of jury trials when so desired by the parties. In England it is said that more than ninety per cent of all indictable cases are disposed of by waiver of the jury and before the court alone. In Canada the law gives the defendant the right to wait for the next jury assizes or to select what is designated as a "speedy trial" before a county court or King's Bench judge, without a jury; provided that in offenses punishable by more than a five-year imprisonment, the attorney general may insist on a jury.

In the state of Maryland, the defendant has had that right almost since the beginning and now the system has been extended to Connecticut, New Jersey, Massachusetts, Wisconsin, Indiana and other states.

In 1933 the session of this Bar Association held at Minot recommended "that in all criminal cases except murder triable in the courts of this state, the defendant shall have the right by leave of the court to waive trial by jury," which recommendation was adopted.

There may be a question whether under our North Dakota constitution a defendant can waive a jury trial in a criminal action, even if he should so desire. The question has never been passed upon by our supreme court and it appears that a good argument can be made both for and against that proposition. As shown in Mr. Carter's article, it has been passed upon in other states and many courts seem to hold the defendant cannot waive a jury trial in the absence of statute.

This committee is of the opinion that the right of the defendant to waive a jury trial in criminal cases will not make much difference in the administration of justice in this state. No member of this committee has in his experience yet found a defendant who was anxious for that right or would have exercised it even if he had had that right beyond question.

However, the whole purpose of the jury is for the protection of the rights of the individual and if there should be an individual who would feel that his rights were equally or better protected by a trial before the court, there does not seem to be any strong reason why he should not be given that opportunity.

Then too, our constitution would have to be amended to permit less than unanimous verdicts or a jury of less than twelve. In such an amendment a provision can well be made for the right of the defendant to waive a jury if he desires.

## SUGGESTED AMENDMENT TO THE CONSTITUTION

The legislature in 1923 attempted to authorize a five-sixths verdict in civil actions. The records of our courts show that numerous such verdicts were received while the statute was in effect. It would seem therefore that such a statute would expedite jury trials.

Our association has gone on record as favoring granting the defendant the right to waive a jury in criminal cases.

At almost every session of this association there is a discussion in regard to expediting the trial of small-claim cases. It has been proposed that no jury be allowed in such cases unless a litigant makes a demand therefor and deposits some fee towards the payment thereof. It would seem that a much better system to expedite such trials, and yet leave to the litigants the protection believed inherent in the jury system, would be a provision for a jury of six in such cases.

For these reasons it seems to the committee that an amendment to the constitution to permit the enactment of laws carrying out these suggestions would be desirable and would tend to improve the administration of justice.

Your committee therefore favors such an amendment to the constitution and believes that all these objects could be obtained in an amendment of Section 7 of Article 1 of our state constitution, if properly worded.

## PROMPT TRIALS

With a view of bringing jury cases to trial more promptly than now possible under existing laws, we recommend legislation enlarging what may be called the trial district for the trial of jury cases.

Under the present law, generally speaking, jury trials are limited, except by consent, to a single county. This frequently necessitates the delay of many months and sometimes years before jury cases can be brought on for trial without unjustifiable public expense.

We recommend that the trial district for the trial of all jury cases be enlarged so that any case properly triable under the present law in a given county may be brought on for trial in that or any other county in the same judicial district adjacent to the county in which the case is now properly triable.

To that end we recommend legislation permitting the states attorney to arraign persons held for trial and the removal of the place of trial either on motion of the states attorney or the defendant, to an

adjacent county in the same judicial district where a jury term is in session or has been or is about to be called, subject to the control of the district court in furtherance of an impartial trial, the convenience of witnesses and the promotion of justice.

And likewise in any civil jury case the trial may be brought on in any adjacent county in the same judicial district on motion of either the plaintiff or defendant on say ten days notice to the adverse party before the call of the calendar in the county in which a jury term has been called, the removal to be subject to the control of the trial judge in furtherance of an impartial trial, convenience of witnesses and the promotion of justice.

In the circumstance of the transfer of either criminal or civil cases, the trial judge should be clothed with power to find and fix compensation to be paid by the county from which to the county to which removal is had for actual expenses incurred because of the removal.

## RECOMMENDATIONS

1.

That the executive committee of this association have prepared a brief, simple statement of how a jury should be drawn and of the importance of jury duty; that it attempt to secure the inclusion of such statement in any forthcoming township manuals and the printing and circulation of said statement amongst the various boards selecting jurors in the state.

2.

That the executive committee prepare a circular for trial jurors acquainting them with their duties and the importance of their work and secure the printing thereof for circulation to prospective jurors.

3.

That the legislative committee of this association be instructed to prepare and present to the legislature an amendment to Section 7 of Article 1 of the constitution to permit the legislature to provide: first, for verdicts by less than a unanimous decision; second, by jurors of less number than twelve in misdemeanor and petty offenses and cases involving less than $500.00 or some set amount; and third, the right of waiver of jury trial in both civil and criminal matters upon the consent of both parties.

4.

That the legislative committee be instructed to prepare and submit to the legislature, the necessary legislation to provide for alternate jurors in protracted civil cases and for the formation of trial districts in accordance herewith.

Respectfully submitted,
G. GRIMSON,
H. C. DEPUY,
ALOYS WARTNER,
Committee.

# CONSTITUTIONAL CHANGES REQUIRED IN MODIFYING JURY TRIAL IN NORTH DAKOTA

## *Introductory*

"The great majority of the states have guaranties in their constitutions of the right of trial by jury. These guaranties generally are to the effect that the right to a jury trial shall remain inviolate, and they have been interpreted by most courts as preserving unimpaired the right of trial by jury as it existed at the time of the adoption of the organic laws and constitutions of the respective states. It is thus incumbent upon the courts to determine, in a given case, whether at the common law, or more accurately at the time of the adoption of the organic law or constitution, there existed the right to a jury trial, which depends essentially upon whether it was at that time an action at law in which a jury trial was customary or could be demanded of right, or whether it was an equitable action in which case no right to a jury trial existed. . .

"The constitutional provision amounts to a preservation of the right to a jury trial; it does not seek to extend it, nor does it seek to limit it. It is competent therefore for the legislature to provide a trial without a jury in actions analogous to equitable suits at common law, or where new rights and remedies are created which were unknown to the common law. Similarly the legislature can designate as triable by a jury issues in proceedings which were non-existent at the common law." [1]

A state may by constitutional amendment make such modifications of jury trial as it sees fit even to the extent of abolishing the right altogether. The States are not restricted by the federal Constitution in this respect. Cooley, in his Constitutional Limitations, (8th ed. 1927), p. 67, says " . . . the States may, if they choose, provide for the trial of all offenses against the States, as well as for trial of civil cases in State courts, without the intervention of a jury, or by some different jury from that known to the common law."

Article I, Section 7 of the Constitution of North Dakota provides as follows: "The right of trial by jury shall be secured to all, and remain inviolate; but a jury in civil cases, in courts not of record, may consist of less than twelve men, as may be prescribed by law."

The question of the constitutionality of any particular modification of the law as to trial by jury in this state resolves itself into a question of what elements of jury trial are essential, and what elements are non-essential. The legislature may not impair the essentials of jury trial.[2] In State v. Norton, 64 N.D. 675, the court held that these elements were unanimity, impartiality, and number. This expression is frequently found in cases.[3]

## *Unanimity and Number*

The elements of unanimity and number are likely to be affected by legislation looking toward modifications of jury trial.

Section 7635a1 of the N. D. Comp. Laws Ann. (1926 Supp.) provided as follows: "Verdict of five-sixths of jury. In all civil

[1] 11 Minn. Law Rev. 449-451, citing numerous authorities.
[2] 16 R.C.L., § 15, p. 196.
[3] 16 R.C.L., § 2, p. 181.

actions or proceedings in any court of record in this state after twelve hours deliberation the agreement of five-sixths of any jury shall be a sufficient and valid verdict; the deliberation of the jury shall be deemed to have commenced when the officer taking charge of the jury has been sworn, and the clerk shall enter such time in his records." (Laws 1923, c. 333, par. 1).

This law was declared unconstitutional in Power v. Williams, 53 N. D. 54, 205 N. W. 9 (1925), in which the court held that the sixth and seventh amendments to the federal Constitution, securing trial by jury in civil and criminal cases, extended to, and were applied in, the Territory of Dakota, and that it became settled law in Dakota Territory, in both civil and criminal cases, that trial by jury required a jury of twelve men, and a verdict by a concurrence of all twelve; and that such jury trial was preserved by Art. I, § 7 of the North Dakota Constitution, citing Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L.R.A. 762, 112 Am. St. Rep. 662, 3 Ann. Cas. 191 (1904), in which the Court had said: "The Constitution refers to 'the right of trial by jury' as a right well known and commonly understood at the time of its adoption, and it is the right so understood which is secured by it. . . It is entirely clear, therefore, that the right of trial by jury secured by the Constitution is the right of trial by jury with which the people who adopted it were familiar, and that was the right which had obtained a fixed meaning in the criminal jurisprudence of the Territory, as defined by the statutes which existed prior to and at the time of the adoption of the Constitution." In Smith v. Kunert, 17 N. D. 120, 115 N. W. 76 (1908), this conclusion had been re-affirmed by a unanimous decision. In the recent case of State v. Norton, 64 N. D. 675 (1934), the Court again reiterated its conclusion that the jury in North Dakota must remain, under the present constitution, a jury of twelve with a unanimous verdict.[4]

It seems clear, therefore, that a constitutional amendment would be necessary to permit the legislature to modify the elements of unanimity and number in jury trials in courts of record in North Dakota.

The constitutions of several states now permit the legislature to provide for less than unanimous verdicts. In Arizona,[5] the legislature may authorize a verdict by nine or more jurors in civil cases in courts not of record, while California[6] allows three-fourths of the jury to render a verdict in civil actions. In Idaho[7] three-fourths of the jury may return a verdict in civil actions, and the legislature is given power to provide for a five-sixths verdict in cases of misdemeanor. According to Minnesota's constitution,[8] the legislature may provide that five-sixths of a jury may return a verdict after not fewer than six hours deliberation. Mississippi[9] empowers the legislature to provide that, in civil suits, nine or more jurors may agree on the verdict. Missouri[10] permits two-thirds of the jury to return a verdict in civil cases in courts not of record, and three-fourths in courts of record. Montana[11] provides

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[4]In that case the court held that women serving on juries was not in violation of the constitutional right of jury trial.
[5]Ariz. Const. (1910) Art. I, § 23.
[6]Calif. Const. (1879) Art. I, § 7.
[7]Idaho Const. (1889) Art. I, § 7.
[8]Minn. Const. (1857) Art. I, § 4.
[9]Miss. Const. (1890) Art. III, § 31, Amended 1916.
[10]Mo. Const. (1875) Art. II, § 28, Amended 1900.
[11]Mont. Const. (1889) Art. III, § 23.

that in civil actions, and in criminal cases not amounting to felony, two-thirds of a jury may return a verdict, but the legislature may, by a two-thirds vote, require a unanimous verdict, notwithstanding the constitutional provision. In New Mexico[12] the legislature has the power to provide for less than unanimous verdicts in civil cases; and Ohio[13] grants the legislature the right to authorize a verdict of three-fourths in civil cases. Oklahoma's constitution[14] provides that, in civil cases, and in criminal cases not amounting to felony, three-fourths of the jury may return a verdict, which must be in writing and signed by each juror concurring therein. Utah[15] permits a verdict in civil cases by three-fourths of the jurors; while South Dakota[16] allows the legislature to provide for a similar verdict in civil cases in any court.

The advantages of less than unanimous verdicts are said to be two, viz., a reduction in the number of disagreements, and a reduced possibility of jury fixing.[17]

Various provisions for juries of less than twelve have been adopted in several states. In California[18] in civil actions and in misdemeanors, the parties may agree on any number less than twelve. In Florida[19] the number of jurors may be fixed by law, but shall not be less than six. In Idaho,[20] except for felonies, the parties may agree on any number of jurors less than twelve, and a verdict may be rendered by five-sixths of their number. The Kentucky constitution[21] provides that "in civil and misdemeanor cases in courts inferior to the Circuit Courts, a jury shall consist of six persons." In Oklahoma[22] in the County Courts, the jury consists of six persons, of which five may return a verdict in trials of offenses other than felony. In Utah,[23] except in capital cases, there are eight jurors, though in inferior courts the jury numbers four and, in civil cases, three may render a verdict. In Virginia,[24] the legislature may provide for juries consisting of less than twelve, but not less than five, for offences not punishable by death or confinement in the penitentiary. In Louisiana,[25] cases in which the punishment may not be at hard labor, shall until otherwise provided by law, be tried by a jury of five, all of whom must concur to render a verdict; cases in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur. Pennsylvania[26] started with less than twelve jurors: "No jury shall exceed the number of seven, nor be under six, unless in special cases upon life or death, the justices shall think fit to appoint twelve." The Constitution

[12]N. Mex. Const. (1910) Art. II, § 12.
[13]Ohio Const. (1851) Art. I, § 5. Amended 1912.
[14]Okla. Const. (1907) Art. I, § 19.
[15]Utah Const. (1895) Art. I, § 10.
[16]S. Dak. Const. (1889) Art. VI, § 6.
[17]Sunderland, Cases Trial and Appellate Practice, Footnote p. 304
[18]Calif. Const. (1879) Art. I, § 7.
[19]Fla. Const. (1885) Art. VI, § 28.
[20]Idaho Const. (1889) Art. I, § 7.
[21]Ky. Const. (1891) § 248.
[22]Okla. Comp. Stat. § 3170. Art. III, § 19.
[23]Utah Comp. Stat. (1917) p. 31; Utah Const. (1895) Art. I, § 10. "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."
[24]Va. Const. (1902) Art. I, § 8.
[25]La. Const. (1921) Art. VII, § 41.
[26]Duke of York's Book of Laws, 1682-1700, p. 33. See also Com. v. Maxwell 271 Pa. 378.

of Colorado[27] provides: "The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. . . " By constitutional provision in South Dakota[28] "the legislature may provide for a jury of less than twelve in any court not a court of record," and in North Dakota the legislature has the same power, except that it is restricted to civil cases.[29]

## WAIVER OF JURY TRIAL

The question as to what changes in jury trial are necessary is affected by the extent to which parties have been held capable of waiving jury trial in the absence of statutory or constitutional provisions for such waiver. It is usually held or provided that parties may waive jury trial entirely in civil actions,[30] or consent to trial by a jury of less than the number required by constitution or statute.[31] In criminal trials for felony, most courts hold that the defendant cannot waive jury trial in the absence of statute,[32] but there are numerous decisions by state courts upholding the constitutionality of positive legislative enactments to the effect that one charged with felony has the right to waive trial by jury and elect to be tried by the Court.[33] Some courts place their decisions against the right to waiver in felony cases on the ground that a judge without a jury has no jurisdiction to try the case,[34] and where this view prevails, it would seem that nothing short of constitutional provision would suffice to confer such right, as it has been uniformly held that jurisdiction over subject matter cannot be conferred by consent.[35] Even where the question of jurisdiction is not an obstacle, it has been held in one case that defendant alone cannot waive jury trial, for the state has an interest and its consent is also required.[36]

There is a conflict of opinion whether a defendant, although consenting, may be constitutionally tried by a jury consisting of less than twelve members.[37] South Dakota has held that he may,[38] even in cases of felony.[39]

There is also conflict of opinion as to whether defendant may waive a jury entirely in cases of misdemeanor, but most courts hold that he may do so, especially where a statute grants the right.[40] A statute in North Dakota provides for waiver by "consent of both parties expressed in open court and entered on the minutes," in misdemeanor cases.[41]

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[27]Colo. Const. (1876) Art. II, § 23.
[28]S. D. Const. (1889) Art. VI, § 6.
[29]N. D. Const. (1889) Art. I, § 7.
[30]Cooley's Const. Lim. 8th Ed. Vol. 2, p. 869; N. D. Comp. Laws Ann. (1913) § § 7637, 9076.
[31]35 C.J. § 107 p. 200, and cases cited. City of Huron v. Carter, 5 S.D. 4, 57 N.W. 947. (There are no decisions on this particular point in N. D.)
[32]11 L.R.A. (NS) 1136. (The writer has found no desicions in North Dakota but Comp. Laws 1913 § 10770 provides that "issues of fact must be tried by jury.")
[33]48 A.L.R. 772 (Cases collected).
[34]Harris v. Slate, 128 Ill. 585, 21 N.E. 563 (1889); Commonwealth v. Rowe, (Mass.) 153 N.E. 537 (1926); Commonwealth v. Hall, 291 Pa. 341, 140 Atl. 626 (1928).
[35]2 Cooley's Const. Lim. (8th Ed. 1927) p. 846.
[36]People v. Scarnavache, 347 Ill. 403, 179 N.E. 909 (1931).
[37]See discussion of the cases in 46 L.R.A. (NS) 38; 103 Ohio St. 585, 134 N.E. 786 (1921), and Commonwealth v. Egan, 281 Pa. 251, 126 Atl. 488 (1924).
[38]State v. Ross, 197 N.W. 234 (S. D. 1924). Misdemeanor.
[39]State v. Tiedeman, 207 N.W. 153 (S. D. 1926). The writer has found no decisions on this question in North Dakota.
[40]48 A.L.R. 769, 770.
[41]N. D. Comp. Laws Ann. (1913) § 10770.

It would seem that any amendments to the state constitution looking toward modification of jury trial should specifically provide for waiver in criminal cases, in view of the uncertain state of the law on the subject.

*Suggested Constitutional Provision Touching Unanimity, Number and Waiver*

Inspecting the jury trial provisions in the constitutions of various states with a view to selecting a model for North Dakota, it was found that the provision in the Constitution of Idaho seems to be sufficiently comprehensive to permit desirable legislative modifications as to unanimity, number, and waiver. It reads as follows: "The right of trial by jury shall remain inviolate but in civil actions three-fourths of the jury may render a verdict, and the Legislature may provide that in all cases of misdemeanors five-sixths of the jury may render a verdict. A trial by jury may be waived in all criminal cases not amounting to felony by the consent of both parties, expressed in open court, and in civil actions by the consent of the parties signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor the jury may consist of twelve or any number less than twelve upon which the parties may agree in open court."[42]

*Petty Offences and Violations of Municipal Ordinances*

Legislatures may provide for summary trial, without a jury, in such cases of petty offences as were not triable by jury before adoption of the state Constitution.[43] Charges of vagrancy and disorderly conduct were never triable by jury,[44] nor were violations of municipal ordinances so triable.[45] There appears to be no instance where the statutes deny jury trial to cases involving petty offences in North Dakota, except in trials before a Police Magistrate for violations of municipal ordinances where imprisonment does not exceed ten days or the maximum fine $20.00.[46]

Many courts have held in criminal cases, that even where denied in the first instance, the constitutional right of trial by jury is sufficiently protected where defendant is allowed a jury trial on appeal,[47] unless unreasonable conditions are imposed as a condition of such appeal.[48] It would seem, therefore, that, without further constitutional change, the legislature of North Dakota could provide for summary trial of the petty offences not triable by jury before adoption of the state constitution; and perhaps also for other minor offences where a jury trial may be had on appeal to the District Court.

*Amount in Controversy in Civil Actions at Law*

The seventh amendment to the Constitution of the United States provides that "In suits at common law where the value in controversy

[42]Idaho Const. (1889) Art. I, § 7.
[43]Byers & Davis v. Commonwealth, 42 Pa. 89 (1862).
[44]See full review by Alvey, J., in State v. Glenn, 54 Md. 572 (1880); also State v. Anderson, 40 N.J.L. 224 (1878).
[45]Dillon on Municipal Corporations, Vol. I, § 433; Callan v. Wilson, 127 U.S. 540 (1887); St. Paul v. Robinson, 129 Minn. 383, 152 N.W. 777, Ann. Cas. 1916E, 845.
[46]N.D. Comp. Laws Ann. (1913) § 3660.
[47]Zelle v. McHenry, 51 Iowa 572 (1879); Sprague v. Inhabitants of Androscoggin County, 104 Me. 352 (1908); Jones v. Robbins, 8 Gray (Mass.) 329 (1857); State v. Tate, 169 N.C. 373 (1915); Brown v. Epps, 91 Va. 726 (1895).
[48]Ann Cas. 1912C, 1114.

shall exceed $20, the right of trial by jury shall be preserved. . ." This provision has been held not to control the action of the several states in abridging trial by jury within their own jurisdiction; it applies only to the courts and Congress of the United States.[49] If jury trial in civil actions at law was enjoyed as a right, regardless of the amount involved, prior to adoption of a state constitution, providing simply that jury trial "shall remain inviolate," a statute abolishing the right in cases of any amount, however small, is unconstitutional.[50]

However, the seventh amendment to the federal Constitution did apply in the territories,[51] and the territorial legislatures could deny jury trial in civil actions at law where the value in controversy did not exceed $20, although they were not prevented from extending it to such cases.[52] The first legislature of the Territory of Dakota did not restrict jury trial to amounts exceeding $20,[53] and it even provided for jury trial before Justices of the Peace,[54] who had jurisdiction in cases of amounts not exceeding $100.[55] Did the Constitution of North Dakota, providing that "the right of trial by jury shall be secured to all, and remain inviolate. . . ,"[56] preserve the right only as to controversies in which the amount exceeds $20.00, so that the legislature could even now abolish trial by jury in civil cases at law involving $20 or less?[57] Whallon v. Bancroft, already cited, seems to be the only one case in point wherein, at pages 75-77, the Court said:

> "In Illinois, under the old constitution of 1818, the right of trial by jury was continued inviolate, and the legislature of the state had placed a construction upon it by limiting the right to trial by jury, in many cases, to controversies which involved more than twenty dollars. The new constitution (of Illinois) of 1848 contained the same clause as the old one, but with the addition that the right should extend to all cases at law, without regard to the amount in controversy; and the courts of that state say in construing it (14 Ill. 171), that 'the object and design of these additional words were, to prevent such a construction as had been put upon the constitution of 1818, and to give the right to a jury trial, in cases at law, without regard to the amount in controversy—not to extend it to a class of cases which have not before been entitled to it.' See also 2 Ohio St. 296.
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> "It may be urged that, as the right of trial by jury existed under our territorial laws, prior to the adoption of the constitution, in all cases at law, regardless of the amount in controversy, the words in the constitution (of Minnesota) which provide that the right shall 'extend to all cases at law, without regard to the amount in controversy,' would be inoperative, unless they are held to carry the right of jury trial to some

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[49]16 R.C.L. 201.

[50]Mattox v. State, 115 Ga. 212, 41 S.E. 709 (1902); DeLamar v. Dollar, 128 Ga. 57, 57 S.E. 85 (1907); State v. Lane, 56 N.J.L. (2 Vroom) 108, 28 Atl. 421 (1893).

[51]Whallon v. Bancroft, 4 Minn. 109 (1859); Cons. Gold & Sapphire Min. Co. v. Struthers, 41 Mont. 556, 111 Pac. 152 (1910); see Power v. Williams, *supra*.

[52]Whallon v. Bancroft, *supra*.

[53]Laws of the Terr. of Dak. (1862) Ch. 8 Tit. 9, Art. I, § 260.

[54]*Id.* Ch. 49, Art. 7, § 61.

[55]*Id.* at p. 3, "An Act to Provide a Temporary Government for the Territory of Dakota 1862", § 9.

[56]N. D. Const. (1889) Art. I, § 7.

[57]The statutes now in force do not restrict jury trial to cases exceeding a certain amount. N.D. Comp. Laws Ann. (1913) § § 7608, 9074.

cases where it did not previously exist. This apparent difficulty readily yields to an examination of the structure of our legislature and courts under our territorial existence, and the necessity for the insertion of these words in our state constitution will be as manifest as it was in that of Illinois, adopted in 1848. The only restriction that operated upon the territorial legislature, in regard to the right of trial by jury, was that contained in article seven of the amendments to the constitution of the United States, proposed in 1789, which was as follows: 'In suits at common law, where the value of controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,' etc. This clause in the constitution of the United States was in full force within the territory, both upon the legislature and the courts, because they both acted under the sole authority of the United States. 24 Wend. 337. This provision, however, did not prevent the legislature from extending the right of jury trial to cases at law involving less than twenty dollars, but only prohibited it from denying it in cases involving more than that amount. The legislature saw fit to extend it to all cases, regardless of amount, but certainly possessed the power at any time to have refused it in all cases at law involving less than twenty dollars. The right, then, in such minor cases, under the laws of the territory, was a qualified right, and not an absolute and indefeasible right, such as rights guaranteed to the citizen by a state constitution. Such being the condition of the right of trial by jury, at the time of the adoption of the state constitution, what right would have been continued inviolate, had nothing been said in the constitution but that 'the right of trial by jury shall remain inviolate?'—manifestly the qualified right secured by the constitution of the United States and the laws of the territory, and nothing more; and the first state legislature, under the constitution, could have done just as the legislature of Illinois did in a similar case, under the old constitution of that state, to-wit, restricted the right of trial by jury to cases at law where the amount in controversy exceeded twenty dollars. It was to avoid this difficulty, and nothing more, that the clause extending the right of jury trial to all cases at law was inserted in the constitution."

Not out of harmony with the above reasoning is that of the North Dakota Court in Barry v. Truax, *supra*, where it was held that defendant's right to a trial by jury of the vicinage was a qualified one before the Constitution was adopted, and remained equally qualified afterwards.[57a]

If the view taken in Whallon v. Bancroft is correct, it would seem that the legislature of North Dakota could even now abolish jury trial in civil actions at law involving amounts of $20 or less, as the state constitution contains no provision that trial by jury "shall extend to all cases at law, without regard to the amount in controversy" as do the Minnesota and Illinois Constitutions.[58] The fact that the legisla-

[57a] See opinion, p. 136 and on.

[58] There is a like provision in the South Dakota Constitution. S. D. Const. (1889) Art. VI, § 6.

ture has already extended the right to cases involving $20 or less should make no difference if the right in these cases is qualified or defeasible.

However, as to amounts exceeding $20, the right could not be taken away without constitutional amendment, as in such cases it was guaranteed in the territory by the federal Constitution, and would be within the principle of Berry v. Truax, *supra.*

The constitutions of a few states restrict trial by jury in civil actions at law to cases involving more than a certain amount.[59]

Even without change in the Constitution of the state, it would seem that the legislature might abolish jury trial in all civil actions triable before Justices of the Peace, inasmuch as a jury may be had on a trial de novo in the District Court on appeal,[60] which has been held to satisfy the constitutional right in civil actions, where no unreasonable conditions are imposed upon the right to appeal.[61]

From time to time we hear of complaints about the jury system and the methods employed in selecting jurors for the trial of cases. Many of the criticisms may be avoided, and expense saved the counties as well, if a little care is exercised in making the selection of citizens to serve on the jury. We believe the code provisions for the selection of juries are adequate, if followed, and after consultation, we have concluded that a simple statement of the law governing the selection of jurors and juries will be of assistance to the officers who have these important duties to perform.

We recommend that, at the time names are selected for the jury list. chapter 81, page 147, Session Laws of 1921, being section 814 of the 1925 Supplement, be carefully read. It states the qualifications necessary and the exemptions allowed, to which we would add that either party to a lawsuit, at the trial, may object to a juror who cannot speak and understand the English language as it is commonly and ordinarily used in the court room. Each person summoned as a juror to attend a term of court, is entitled to five cents a mile each way from his home to the court house and also four dollars per day or part of day for attendance, and if not qualified will be discharged by the court, drawing his pay for attendance. Careful attention to these matters of qualification and exemption will result in a saving to the county.

"Jury Lists" herein referred to means the names of the 200 persons from which the trial jury is selected and such list is kept by the clerk of court. "Jury Book" referred to is the book in which the names of jurors selected are recorded.

We assume that there is now a jury list for each of the counties of this district, in the possession of the clerk of court; that the clerk of court keeps a book known as a jury book, and that each municipality—township, city and village—in the county, also has a jury book which is kept as hereinafter designated. If the township, city or village does not have such a book, it should obtain one at once, and put it into use.

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[59]Md. Const. (1867) Art. XV, § 6. More than $5; N.H. Const. Art. 20, as amended in 1788. More than $100.

[60]N.D. Comp. Laws Ann. (1913) § § 9172 and 9180-1.

[61]2 Cooley's Const. Lim. (8th Ed. 1927), p. 868; Capitol Traction Co. v. Hof, 174 U. S. 1 (1899).

The jury list must contain the names of 200 persons having the qualifications specified in section 814 of the 1925 Supplement, which list must always be kept at the maximum of 200 names. When the list falls below that number, which will occur after each jury term of court, the clerk of the district court shall make a requisition upon the Board of County Commissioners for the furnishing of as many names as may be necessary to keep the list full. The Board of County Commissioners, if then in session, or at its next meeting, shall proceed to apportion to the several townships, cities and villages of the county, its prorata share of such requirement, and require the governing bodies of said municipalities to furnish the required names. Upon receiving notice from the county auditor of such apportionment the clerk or auditor of the city, village or township, as the case may be, shall immediately thereafter cause to be posted in three public places in the city, village or township, as the case may be, a notice that the city council, board of aldermen or board of supervisors, as the case may be, will meet to draw the names of qualified jurors in accordance with such apportionment, which notice shall state the time and place of such meeting within the municipality and designate a day not less than 5 or more than 10 days from the day of posting such notice. The names appearing on the assessor's lists of the several townships, villages or cities for the preceding year shall be the basis for making such apportionment.

Three times as many names as are apportioned to the township, city or village shall be selected from the names of the resident taxpayers thereof, having regard for the qualifications of such persons, and the clerk of the township or village and the auditor of the city shall write each name so selected in a book to be kept for that purpose, called the jury book. These names must be also written on a separate ticket or slip, and the tickets compared with the recorded list. The tickets are then to be folded, placed in a box and the box shaken. One of the members of the board shall then draw from the box the number of tickets corresponding with the names so apportioned to the municipality. The clerk or auditor, as the case may be, shall then write the names so drawn, with the post office addresses of the persons so drawn, in the jury book, and transmit said names and post office addresses to the clerk of the district court. The letter and spirit of the law requires, and it is the duty of, these respective boards to so select and arrange the names THAT NO ONE PERSON SHALL COME ON THE JURY A SECOND TIME BEFORE ALL OTHER QUALIFIED PERSONS SHALL HAVE SERVED RESPECTIVELY IN ROTATION.

The jury list of 200 names is now completed. The drawing of the jury for the term of court next follows. The district judge orders the clerk to summon a jury. Within three days after receiving the order, the clerk must call a meeting of the county jury board to select jurors, which board consists of the clerk of the district court, the county auditor, county treasurer and sheriff, or a majority thereof. The sheriff will be disqualified from acting on said board if he shall be a party to any suit pending in the court, and may become disqualified for other reasons, in which event the county coroner shall be called in to sit in his stead. The clerk of court shall also, at least one day prior to the time set for the drawing of the jury, notify by mail each attorney or firm of attorneys in the county of the time and place when and where the board will meet.

Before selecting the jury, the clerk shall, at the meeting, go through the jury list, that is, he must read off the names on the jury list, and shall strike therefrom the names of any persons known to him or to the board to be dead, or who have removed from the county, or who are not citizens of the United States and of this state, or in case of duplication, and shall then write the name of each person remaining appearing on the jury list, on a separate ticket or slip, which shall be compared by the other members of the board with the jury list as corrected, and, after correcting errors, if any, the tickets or slips shall be folded, placed in a suitable box, and the box shaken so as to thoroughly mix the tickets or slips. One of the members of the board, not the clerk of court, shall then draw from the jury box, by lot, the number required to form the jury so ordered.

The names so drawn to form the jury shall, thereupon, be stricken from the jury list, and, at the termination of the term of court, for which the jury has been drawn, the clerk shall again make requisition to the Board of County Commissionners for a sufficient number of names of qualified citizens to fill the list of 200 names, when the same operation will be repeated.

The clerk of court will also write the names of those selected for jury service as hereinbefore specified, in the jury book, and also write in the jury book the names of those drawn for service as jurors.

F. T. LEMKE,
H. L. BERRY,
THOMAS H. PUGH.

## CIRCULAR FOR TRIAL JURORS

To Each Juror:

Before you begin your work as a juror you are requested carefully to read this circular, so that you may thoroughly understand your duty as a juror.

This circular is designed to inform you as to your duty as a juror. It is written so that laymen may understand it. Words in common legal use have been avoided until after their meaning and effect have been stated. The order of the questions and answers has been determined by that principle.

A juror's knowledge of his obligations results in the proper performance of his duties and assists the work of the court. It will help you to read this with great care.

## SUGGESTIONS FOR ALL JURORS

Q. *Who are involved in the ordinary civil case?*

A. A plaintiff and a defendant.

Q. *Who is the plaintiff?*

A. He is the one who is making a claim against another person.

Q. *Who is the defendant?*

A. He is the one who is opposing the claim made by a plaintiff.

Q. *What makes up a court for the trial of such a dispute?*

A. A judge and a jury.

Q. *What does the jury do?*

A. The jury decides the disputed questions of fact. The jurors are the sole judges of the facts. Their decision, if it has on any reasonable view the support of the believable evidence, is final and cannot be disturbed. It is very important therefore that the jury decide the facts honestly and correctly.

Q. *Upon what does the jury base its decision on the facts?*

A. The jury may base its decision on the facts only upon the evidence received from the witnesses, and any exhibits that may have been received in evidence. The jury must not decide any questions of fact upon anything outside of the evidence in the case. The jury is not to decide any questions of fact upon any statement of fact made by the judge or the lawyer for either of the parties to the dispute unless such statement of fact is based upon evidence in the case, which the jury accepts as being true. The jury's recollection of the facts and not the recollection of either lawyer or the judge is to control.

Q. *May the jury draw inferences of fact?*

A. The jury may draw any inferences which, in their opinion, can be reasonably and honestly drawn from any fact which is directly established by the evidence which they believe is true.

Q. *How should personal interest of witnesses affect the jury in weighing the evidence?*

A. The jury is to consider what personal interest each witness, whose testimony they may be considering, has in the case. This will shed light on whether the witness is allowing his personal interest in the outcome or his interest in the people involved to affect the accuracy or truthfulness of his evidence. Some witnesses allow this to affect them and others do not.

Q. *Is the jury to weigh the evidence by counting the number of witnesses?*

A. No. The mere number of witnesses in and of itself does not determine weight. The jury must determine the weight of testimony upon the basis of its quality. Sometimes the weight is with the side having the larger number of witnesses and sometimes the weight is with the side having the smaller number of witnesses.

Q. *How is a juror to determine the quality of testimony?*

A. A juror is to determine its quality upon the basis of this test: Does the testimony have such persuasive effect upon your judgment that you are induced to believe it? Such testimony is the believable and credible testimony. Such testimony furnishes the basis upon which you should weigh the evidence.

Q. *What will enable a juror to determine what testimony is believable and credible?*

A. There are several ways. One is observing the manner in which a witness testifies to decide whether he is evasive or straightforward. Another is determining whether the witness had the opportunity to know that which he says he knows, by being where he could have known or where he had a good opportunity to see or hear that

which he says he saw or heard. Another is considering whether the witness was sufficiently observant to have seen or heard that which he says he saw or heard, or is of a sufficient degree of intelligence to be able to recollect or remember that which he says he saw or heard. Another is whether it would be reasonably probable that he would or would not have seen or heard that which he says he saw or heard. All these things help jurors to decide whether testimony is believable and credible, together with the final test in a juror's mind as to whether the witness' story rings true, the deciding of which is partly a matter of sensing or instinct or intuition.

*Q. When it appears that a witness has testified to something that is not true, should that witness' testimony be rejected in its entirety?*

A. Under certain conditions jurors *may* do so. Note that the word is *may,* not *must.* If a witness testifies to that which the jury becomes satisfied is untrue, they may reject his entire testimony, if two things are true: One that the fact which has been falsely testified to is *material;* that is, has a material bearing upon the disputed question that is to be decided, and the second is that the witness *wilfully,* that is, knowingly or purposely testified falsely to that material fact. If they believe that he did not knowingly testify falsely, but merely made an honest mistake; or if the testimony which is false is not material or important the jury may not reject such witness' entire testimony, but may consider this fact of error or falsity in deciding what value is to be given to his testimony. This makes it important to determine whether that which is incorrectly testified to by any witness is testified to falsely as a matter of evil purpose on his part with the intent of misleading, or whether it is an honest error due to thoughtlessness or nervousness or due to his having become "rattled" while in the witness chair.

*Q. What is an "issue" for a jury in a case?*

A. It is a question of fact or a disputed point of fact. The disputed questions of fact in a civil suit are called the issues existing between the plaintiff and the defendant. When in a civil action, the law requires either the plaintiff or the defendant to prove an issue or a disputed point in a case, we say that such party has the burden of proof. The party having the burden of proof on an issue or a disputed point in a civil case must establish his claim by a fair preponderance of evidence.

*Q. When can it be said that the evidence preponderates in favor of one side or the other?*

A. The burden of proof on an issue is not sustained where the evidence of the one having the burden of proof strikes an even balance in the minds of the jurors with the evidence of the other side. This, of course, means the believable and credible evidence. When the evidence of the person having the burden of proof on any issue merely strikes an even balance with the other side, or where the other side's evidence outweighs his evidence, such a person must be defeated on that particular issue. If his evidence outweighs the evidence of the other side then he should have the issue decided in his favor. The person having the burden of proof on an issue must win on that issue on his own strength and not on his opponent's weakness.

*Q. What does the judge do in the trial?*

A. The judge decides the questions of law, among others as to what evidence should or should not be admitted. The judge's rulings are based upon the results of hundreds of years of experience in courts in the determining of questions of fact. The fact that one side or another objects to a particular question should not and may not be made the basis of any inference for or against that person's side. Under the law each side has a perfect right to object to any question asked a witness or to any other evidence offered. Whether the judge decides that the question or the evidence is proper or improper does not concern the jury because that is a question of law for the judge to decide. The judge is the *sole source* of the law in the case. The jury, by their oaths, are required to apply the law as the judge gives it to them, whether they approve of its being the law or not. If they fail to do that the jurors violate their oaths and destroy the basis for the impartial administration of the law and are faithless to their high trust and duty.

*Q. Why should the jury be required to accept the law from the judge and no one else?*

A. If this were not required there would be utter confusion in the administration of the law. If each juror applied his own idea of the law or what he thinks it should be, you might have twelve different standards of law in a case and those standards would vary in every case. The law would therefore differ in every case and different sets of persons under the same circumstances would receive different decisions on the same or similar facts. This would not be an impartial administration of the law. This makes it necessary as a practical thing that but one person be allowed to state what the law is. The absolute need for uniformity makes necessary as a practical thing the accepting of the law from that one person, the judge, and from no one else and makes reasonable the requirement that each juror shall set aside his own individual idea, if he has any, as to what the law is or should be. If the judge is wrong, that can be determined in a proper manner. It is not a part of the jury's duty to pass judgment upon whether he is right or wrong.

*Q. Where does the judge get the law from?*

A. He gets the law from the constitution, adopted by the people directly, from the statutes passed by Legislatures and from the decisions of the courts themselves, based on human experience for hundreds of years. When the law is in need of change, the Legislatures or the people themselves have the power to and do change it. Until the people or the Legislatures do change it, it should be and must be accepted and applied. It is no part of jurors' duty to modify it or change it in applying it to the facts they are called upon to decide. If they assume to do such a thing they are violating their oaths of office and are false to their trust.

*Q. What consideration should jurors give to what the lawyers state to be their idea of the facts, or what the lawyers in their arguments state to be the law that is to be applied to the facts?*

A. The jury should disregard any statement of fact, or any arguments based upon any fact stated by the lawyer, which facts they do not think have been proven by the evidence in the case, or which line of reasoning they do not accept as sound. When it is founded

upon facts accepted as true by the jury, they are free to adopt the reasoning advanced by counsel on either side. The jury is to ignore or disregard any statement of law made by the lawyers. The judge is the sole source of the law. The judge states the law in his talk or charge at the end of the case.

*Q. What effect should jurors give to the opinions of medical witnesses or other experts?*

A. Jurors should give no effect to the opinion of any expert witness, medical or otherwise, unless they accept as true the facts upon which the opinon is based, and also conclude that the opinion is the honest opinion of the witness. If they believe the opinion is unsound even though they accept the facts upon which it is based as true, or if they reject the facts upon which it is based as not being true, then jurors should reject and disregard the opinion.

*Q. When testimony is stricken out by the judge how should jurors give effect to such action?*

A. By ignoring the testimony stricken out as if they had never heard it uttered.

*Q. How should jurors take up in their jury room the consideration of the disputed questions of fact?*

A. They should approach the matters submitted to them in a calm manner; they should avoid heated disputes; they should avoid becoming partisans on either side; they should discuss and confer with a single purpose of determining what the truth is; they should seek to reach their determination by applying the tests already indicated to be applied. Every juror should respect every other juror's judgment where that judgment seems to be founded upon a reasonable basis. Each juror should be willing to yield up his own judgment when it becomes apparent that he has overlooked or failed to give sufficient weight to some element that some other juror convinces him should be given greater weight; they should by every reasonable, honest means seek to arrive at an agreement that will be founded upon an honest and reasonable view of believable evidence in the case plus a conscientious and honest applying of the law as given to them by the judge.

*Q. Should jurors give any effect to the fact that the judge denies a motion to dismiss at the close of the plaintiff's case or at the close of the whole case?*

A. Jurors have no concern with such a matter. That is a question of law. They should not allow the disposition of it to affect their judgment on the facts one way or the other. If a motion to dismiss is denied it merely means that the judge is of the opinion that there are disputed material questions of fact which should be decided by the jury, and that it is in the interest of both plaintiff and defendant that the jury should decide these questions of fact. The decision of the facts is the jury's duty, just as the stating of what the law is, is the exclusive function of the judge, which law the jury should not impair or weaken by failing to apply it to the facts as they decide them to be.

The foregoing are merely some of the elementary things that all jurors must know to enable them to be capable jurors. The jury system

in the administration of justice is founded upon the idea that jurors are intelligent; that they are honest; and that they will confine themselves to their own sphere of deciding the facts and conscientiously applying the laws to the facts as it is given to them by the judge. It is founded upon the theory that they will decide the facts and apply the law without regard to who is the plaintiff or who is the defendant, whether it be a man, woman or corporation, in order that all persons, rich and poor alike may obtain an honest decision of their disputes with each other. The jury is bound as a matter of law to refrain from deciding any question of fact on a basis of sympathy or prejudice either in favor of or against any person or corporation. They are likewise bound not to permit sympathy, bias or prejudice to cause them to fail to apply the law as it is given to them, to the facts. A jury's decision should be arrived at without regard to race, class, creed or color. It should represent truth. It will then be Justice, which is merely truth in action. The jury's action is in the form of a verdict, which means literally, "truly saying." That is, a jury's verdict is and should be the ascertained truth.

Jurors should realize that it is to their personal interest to see to it that the verdict registers the truth in the case they are deciding. This is important because jurors themselves may be forced at any time to come to court, as plaintiffs seeking to enforce rights or as defendants resisting claims asserted against them and they should conduct themselves as examples to the jurors whose intelligent, honest action they may perhaps, be required to rely upon for the enforcement or protection of their property rights or reputations or even their life and liberty.

Jurors who conform to the foregoing elementary requirements and the more detailed or specific instructions of the judge in his charge will be properly performing one of the loftiest functions given to any man to perform, that of doing justice between his fellowmen.

## SPECIAL SUGGESTIONS FOR JURORS IN CRIMINAL TRIALS

While it is true that "one of the loftiest functions given to any man to perform is that of doing justice between his fellowmen" a graver and far more important duty is rendering justice between his fellowman and the State. When a citizen is called upon to act as a juror in a criminal case, he becomes the arbiter of the guilt or innocence of a fellowman charged with a violation of the law and thus upon him rests the grave responsibility of determining life or death, freedom or restraint. Such a juror is the protector of the community. In civil cases, only the property rights of the individual may be affected; but the issues in a criminal case concern the entire community. The conscientious administration of the criminal law insures the protection of the person of the individual and the perfect enjoyment of his property. The juror is an important part of that administration.

The citizen, when called upon to act as such a juror, should always have in mind his grave responsibilities; and in the important discharge of his duties, should strive to put aside his human emotions and become a cool, unbiased and unprejudiced judge. He must be honest to his oath. He must not permit sympathy or prejudice to sway his judgment, and must grant favors to no man.

In addition to the questions propounded and answers given in relation to civil actions, all of which should be studied by jurors generally, the juror in the criminal case should pay particular attention to the following:

*Q. In what respect does a Civil case differ from a Criminal case?*

A. In a criminal case the State is always the plaintiff or prosecuting party, while in a civil case the parties, plaintiff and defendant, usually are private individuals or corporations. In a Civil case the party having the burden of proof on an issue must sustain it by a fair preponderance of evidence, while in a Criminal case the State must sustain the burden of proof of the charge of guilt it makes against the individual defendant, beyond a reasonable doubt.

*Q. What are the functions and duties of a Juror?*

A. The sole prerogative and the only function of a juror is to pass upon questions of fact; to decide if, under the evidence presented, the defendant committed the crime charged. In his deliberations, the juror must not consider anything outside the evidence given before him. He must set aside any preconceived notions he may have of what the law is or should be, and accept and be guided solely by the law as given him by the Court. He must not question any rule of law which the Court lays down for his guidance, because the Court alone is empowered to declare what the law is, and the juror, under his oath, must apply that law to the evidence presented. The jurors are judges and in their consideration of the facts of the case should endeavor to exercise that quality of firmness of purpose and of evenly balanced mind so necessary for a just verdict; and, when judgment is rendered, possess a courage to pronounce the verdict no matter what the consequences may be.

*Q. Upon whom rests the burden of proof?*

A. The burden of proof throughout a criminal trial rests upon the State to prove the guilt of the defendant beyond a reasonable doubt. The defendant is not compelled to prove his innocence. The presumption that he is innocent remains with the accused throughout the entire case until his guilt has been proven to the satisfaction of the jury beyond a reasonable doubt.

*Q. What is a reasonable doubt?*

A. The term "reasonable doubt" carries with it its own explanation. It is just what the words imply: a doubt founded upon reason. It does not mean merely a doubt of some sort, but is such a substantial doubt arising in the mind of a reasoning man after a careful review and consideration of all the evidence, or the lack of evidence in the case, which produces an uncertainty and not an abiding conviction of the defendant's guilt. A reasonable doubt is one for which, should he be called upon, a juror can give a reason. It is not a guess or a whim, nor is it a surmise that for some unknown reason the defendant may be guiltless, nor is it a subterfuge that may be resorted to to avoid the doing of a disagreeable duty. A reason must support the doubt.

*Q. Should consideration be given to the failure of the defendant to take the stand as a witness?*

A. The defendant in a criminal trial has the absolute right to testify as a witness in his own behalf, or not to testify, as he may determine. He cannot be forced to become a witness. The law declares that the defendant's neglect or refusal to testify does not create any presumption against him. In other words, the fact that the defendant has not availed himself of the opportunity to testify must have no effect on the juror's mind, and must not be used by the Jury to the defendant's prejudice. The juror should always remember that his verdict is based solely upon the evidence given before him.

*Q. Are rulings by the Court on questions of law and arguments of counsel addressed to the Court, to be considered by the Jury?*

A. The decisions of the Court on motions or the rulings upon objections to the admission or exclusion of evidence during the trial are matters of law and must not be considered by the Jury as an expression of opinion by the Court on the facts. All arguments of counsel on the various questions of law or on motion arising during the trial are addressed to the Court and must be disregarded by the Jury. Arguments of counsel addressed to the Jury, based upon the evidence, should receive consideration by the Jury. If, by offers by counsel to prove things which were not proved, or which were not permitted to be proven, or by excluded answers of witnesses, any suggestions were conveyed to the minds of the Jurors of things not in evidence, those matters must be rejected and given no consideration in the determination of the questions submitted.

*Q. What is the distinction between direct and circumstantial evidence, and why should circumstantial evidence be considered?*

A. There is a difference between evidence consisting in facts of a peculiar nature and hence giving rise to presumptions, and evidence which is direct, as consisting in the positive testimony of eye-witnesses. The mind may be reluctant to conclude upon the issue of guilt in criminal cases upon evidence which is not direct, and yet, if the facts brought out, when taken together, all point in the one direction of guilt, and to the exclusion of any other hypothesis there is no substantial reason for that reluctance. Purely circumstantial evidence may be often more satisfactory, and a safer form of evidence, for it must rest upon facts, which, to prove the truth of the charge, must collectively tend to establish the guilt of the accused. In the evidence of eye-witnesses to prove the facts of an occurrence we are not guaranteed against mistake, and falsehood, or the distortion of truth by exaggeration or prejudice; but when we are dealing with a number of established facts if, upon arraigning, examining and weighing them in our minds we reach only the conclusion of guilt, the judgment rests upon pillars as substantial and sound as though resting upon the testimony of eye-witnesses.

All that should be required of circumstantial evidence is that there shall be positive proof of the facts from which inference of guilt is to be drawn, and that that inference is the only one which can reasonably be drawn from those facts.

*Q. Is the punishment that may be imposed a matter for a juror's consideration?*

A. With the question of what punishment may be imposed in the event of conviction, the juror has no concern whatever, and he should

not permit that question to influence his judgment in the slightest degree. The jury has the important issue to determine: the guilt or innocence of the defendant, and when the verdict is rendered, the juror's function is ended. The punishment is solely for the judge to fix.

*Q. May a juror visit the scene of the crime?*

A. A juror under no circumstances should visit the scene of the crime, or the place at which any natural fact connected with the crime occurred, unless directed to do so by the Court. The Court, if it considers it necessary, may order the Jury, in a body, under charge of proper officers, to view the place of the crime, which must be shown to them by a Judge of the Court or by a person appointed by the Court for that purpose. Until such an order is made the juror should be careful to avoid the scene so as to prevent unauthorized impressions which may affect his judgment of the case.

JUDGE GRIMSON: I move the adoption of this report.

MR. WARTNER: Second the motion. (The motion was duly submitted and carried).

JUDGE GRIMSON: I think possibly there should be some consideration of the recommendations, especially the recommendation in regard to the enlargement of the trial districts. It is one new feature and one which has been tried out by DePuy.

MR. LAMBERT: It seems to me that is one of the most clear and definite reports I have heard in a great many years. I don't think anything can be gained in a lot of discussion. I don't think there is any argument on it.

MR. NOSTDAL: The report which has been adopted covers everything. The motion has been seconded. If Mr. DePuy wants to explain some of the things not so well understood, I don't see why that can't be done.

MR. DEPUY: I have no desire to make any explanation in what I was in a measure instrumental in drawing. With the added reform to the new deal, part of the new deal, we had the idea perhaps we might get something in the new deal that the Republican members of the Bar might be in sympathy with and we tried to make it so clear that it would be self explanatory so I don't know that I have a single thing to add.

PRESIDENT FOSTER: Was it your idea, Mr. DePuy, that this matter should by the Executive Committee of the Association be referred to the Legislative Committee so some law could be drawn? If that is the idea, then I think a motion to that effect should be in order. I declared the original motion was carried. If there is another motion with a view to referring it to the legislative committee so that a proper attempt can be made at the next session of the legislature for the constitutional amendment, the chair would like to have such motion.

MR. DEPUY: Mr. President, I signed that report but I confess a good deal of ignorance on my part. My impression was the report itself recommends that it be submitted to the executive committee or the legislative committee.

PRESIDENT FOSTER: I think that is true. Then that is all that is necessary.

It is almost noon now and we have a short report of the Committee on Uniform Acts presented by Mr. C. J. Murphy. We will ask Mr. Tillotson to read it.

## REPORT OF COMMITTEE ON UNIFORM ACTS

One of the functions of this committee is to keep the Association informed as to the uniform acts prepared and recommended for adoption in the several states by the National Conference of Commissioners on Uniform State Laws, and approved by the American Bar Association. We do not understand that it is the duty of the committee to investigate laws adopted in other states and if they would apply to conditions in this state recommend their adoption. The old committee did not, so far as this committee is advised, inform itself with respect to the recommendations of the National Conference on Uniform Laws made in 1934. The subject of uniform laws was not taken up with the legislature at its last session, although some uniform laws were adopted at this last session, as will be pointed out later.

At its recent meeting at Los Angeles the conference completed its draft of the following facts: Airports Act, Aeronautical Regulatory Act, Transfer of Dependents Act, and Vendor and Purchaser Risk Act.

Three of these deal with subjects of more than usual current interest and should be considered by this Committee during the coming year with a view to urging their enactment at the next session of the legislative assembly if they are found to meet the needs of our state.

The proposed acts thus completed make a total of fifty-seven proposed uniform acts. Of this number North Dakota has adopted eighteen. The last of these, the uniform Motor Vehicle Operators' and Chauffeurs' License Act was enacted at the recent session of the assembly with such changes from the act recommended for passage by the National Conference as were found desirable to meet the conditions existing in this state.

Respectfully submitted,

C. J. MURPHY,
MILTON K. HIGGINS,
CHAS. COVENTRY.

JUDGE BRONSON: In moving an adoption of the report, I want to supplement my motion with just a few remarks, which will be very short. If anything at all, the lawyers are concerned with the work of the conference and makers of uniform state laws. It is one organization where the lawers as lawyers have an opportunity not only for organization, but an opportunity to participate in actually drafting of laws for our commonwealth. We say that there is a science of medicine. There certainly is a science of law and there is an art in making laws. Now we are concerned in the main with the work of the conference. I have been concerned that each state bar association of our union have a committee on uniform state laws. During the past year every state organization in the country has been contacted. Forty per cent of our state bar associations in the country now have a committee on uniform state laws. The thought involved is that the bar of each state should be concerned as to what uniform state laws should be

introduced in the state of its residence, and should be concerned in considering the experience of the uniform state laws in the state where that bar association is located. I want to bring to you the idea further in submitting the report that the American Law Institute with whose work you are becoming familiar has now appointed a committee to cooperate with the committee or conference on uniform state laws not only in drafting certain legislation for the Bar of the country, but in formulating certain laws in connection with the work of the American Law Institute. This is a very important section of the American Law Institute and the Conference or Committee on Uniform State Law.

For your information there has been adopted throughout the United States 638 different statutory enactments. The State which has adopted the most of the uniform state acts is Wisconsin which has adopted 30 followed by Utah which has adopted 29. Now in our coordinating movement of trying to get the entire bar of the country under a representative head and of trying to make its influence widespread as an organized bar of the country, this movement of the conference of committee on uniform state law where the lawyers as lawyers propose model acts is a forward looking proposition for the bar of this country, and for that reason, Mr. Chairman, the functioning of this committee in my home state is desired as well as securing attention of the bar associations of the country, and a movement is on to have in every state a committee of this character so that the bar itself may take into consideration and actively be concerned in considering these model acts which are prepared by lawyers for all the lawyers of our state. I move the adoption of the report.

(The motion was duly seconded, submitted and carried).

PRESIDENT FOSTER: Knowing Judge Birdzell as we all do, he being a friend to all of us and a citizen of our state, I know that none of us will want to miss his address this afternoon.

We have quite a number of committee reports and a discussion by Mr. C. L. Young of Bismarck on the State Bar Board, which I know is going to be intensely interesting. Mr. Tillotson says Mr. Young will not be here. However, do not miss the session this afternoon.

MR. LACY: Mr. President what time will Judge Birdzell give his address?

PRESIDENT FOSTER: I think we will put him on the first thing this afternoon.

*Afternoon Session*

PRESIDENT FOSTER: Gentlemen, we have quite a lot of work to go through yet and one of the treats of the meeting yet to come, and we are anxious to get started. I think that every one in the State of North Dakota who has been in touch with the practice of law knows Judge Birdzell. It is quite significant that when good counsel was needed by the government at Washington, they came to North Dakota and selected one that we couldn't very well afford to lose, and I am sure we are all mighty pleased to have Judge Birdzell with us and to speak to us. I now present Judge Birdzell.

## FEDERAL DEPOSIT INSURANCE

JUDGE BIRDZELL: Mr. Chairman and gentlemen of the Bar Association: I have my speech prepared here and I will lay it off to one side. I will probably forget about it so that there is no danger that I will try to inflict a great deal of that material on you. I take it that one of the reasons that is responsible for the invitation which was so kindly extended to me to be here was that you were desirous of learning something about the activities of the corporation with which I happen to be connected at the present time, and consequently I am going to give you in a short while an outline of the activities of that corporation and something of a background to indicate its significance.

I didn't come to speak to you about the Constitution. Other speakers have covered that subject but I do want to refer briefly to one characteristic of the Constitution that is generally, I believe, lost sight of in the popular discussion at this hour, and that is that the Constitution itself is a very practical instrument. It is founded upon an actual necessity. When General Washington was at Mount Vernon in retirement at the close of the Revolutionary War, observing the predicament of the Colonies, and the growing discontent on every hand, he it was that observed the necessity for the formation of a stronger union of state than then existed, and his diagnosis was that what was needed was an extension of federal powers; in fact that that was absolutely necessary in order that the freedom which had been won in the Revolution might be maintained. And among the chief causes of the unsettled condition of that time was the jealousy of the various thirteen states of one another. There was the practice of levying taxes on the imports of one state into another state and that bred jealousy—it bred minor warfare. There was a state of anarchy prevailing at times in some sections of the Union and the answer was the Constitution of the United States, and the Constitution of the United States with the extension of federal powers and the protection against the practices that were driving the new states apart. The same Constitution itself was responsible for cementing the Union and ultimately creating what we are pleased to term today a national economy. There is no longer a state economy that is founded upon any principle—I mean a state economy in the industrial sense, that is founded upon any lasting sound principle. It is true that there is a state economy here and there that enables a state, by reason of its location or otherwise, to have economic advantages that may not be shared by others, but insofar as one state may attempt through flexible labor laws, child labor or otherwise, to reap an advantage over other states industrially, it but creates a national problem that must somehow be solved. How it may be solved is not for me to say, but I do want to say that the Constitution itself came at a time when it was necessary to rescue the 13 states from a condition of anarchy, and the Constitution itself is responsible for the character of national economy that has developed in this country, and the development industrially, financially and otherwise under that Constitution is one that concerns every man, woman and child in every part of this broad land.

Now in relation to banks the federal government had from the beginning every power in relationship to banking that it has today, but an ideal system of banking was not created in the beginning. It was

not even born out of the fertile brain of Hamilton. It took the industrial development and the experience of many years to bring about the exercise of constitutional powers of the federal government in relation to banks. We never even had the national banking system in this country until 1862 and that was born out of the necessity of financing the Civil War. Prior to that time our currency was the currency of state banks and there were various currencies, of course, and they did not well serve the conveniences of commerce throughout the country. When the national banking system came into vogue, it was necessary to do something to vindicate the constitutional powers of the federal government to provide for the coinage of money and fix the value thereof and making the national currency a real national currency. That was done through taxing the state currencies out of existence. We drift on and learn lessons out of all our disagreeable experience.

We have never built up in this country, we have not constructed as yet upon the national banking act of 1862, a national or a uniform banking system. When thinking of the banking system, I think of the discussion that took place between some individuals who were tracing the origin of the various professions. One of them maintained that medicine was the oldest profession, or rather surgery, and in order to prove his point, he turned to Genesis. He says, "It tells the story of how woman was created from the rib of man. That implies a knowledge of surgery, the application of the principles of surgery, so surgery is the oldest profession." Another said, "That is not the way I read that chapter. I gather from that chapter this, that engineering is the oldest profession because the Good Book says that all creation was in accordance with a plan, and of course, it required an engineer to plan, or a knowledge of engineering, so engineering is the oldest profession." Another says, "No that doesn't seem right because as I read it, it says that before anything else, there was chaos, and therefore banking is the oldest."

Now that is about the condition we were in in 1933. We were in a chaotic condition so far as the banking system in this country was concerned. The functions of commercial banking and investment banking had been intermingled, with some of the results I spoke of last evening. You all know how the banks were overloaded with securities that turned out to be almost without value and you know how by the banking act of 1933, the function of investment banking was made separate from the function of commercial banking. And then we also note that out of the experiences preceding our last great difficulty with banking preceding 1933 that depositors in banks were being made to bear the losses. They did not bear all the losses, of course, because the stockholders also lost very heavily, but did you ever stop to think whether or not there is any real necessity for stockholders or depositors ever losing anything in banks? To set up a bank it required a capital structure with a ratio of something like one dollar of capital to ever dollar of deposits. Then we set up a machinery to supervise the operations of that bank, to see that the capital does not become impaired. If it becomes impaired, we require the impairment to be cut down.

Now one would think that with all of the law that is on the statute books, not only of the federal government but every state in the union requiring the capital of banks to be kept up and at a safe margin, that

depositors would never be called upon to lose a dollar in banks, but that is not the case. Bank failures multiply, of course, in times of depression, but in the period of 1922 to 1932, approximately 10,000 banks failed in this country. The bank failures involved deposits on an average of about $400,000,000 a year. Now it would seem that we are lacking altogether in ingenuity and ability to take care of our own business if we can't provide some way to avoid the heavy loss involved in such numerous bank closings. That does not characterize depressions in other countries. It is very seldom in other countries that there are heavy deposit losses in banks and there is no reason why, with proper organization in this country, that our experience should be different in that respect, but we have 48 states, each independent, and of course, each having the power to charter banks, and we also have the national government with power to charter banks.

Now what is the answer that has been given by Congress to the problems that I have just suggested? The answer is this—the answer is an insurance corporation sufficiently capitalized and with adequate power to raise funds sufficient to meet any losses in banks that might be reasonably anticipated, and let the contributions to that corporation serve as a reserve fund, as it were, to prevent depositors from losing their money in banks. If we had a chain system of banking such as they have in Canada, why there would be but few banking corporations and many individual units spread over a vast empire like they are in Canada. Each of these chains, or each of these units, would in itself in the natural conservative operation of its business provide reserves so that if there were a crop failure in one section of the country, and that was concurrent with a fair degree of prosperity in another country, those units in the section where the crops had failed, or where there were economic reverses, the losses there would be met by the gains from other units in the same organization, and there would be no loss, and that I think largely explains the reason that there are no losses to depositors in Canada.

But we can't have that kind of system of banking organization in this country. We do not want that kind of system of bank organization in this country, but we must put between the depositor and loss that same condition of protection in some form that exists where you have the type of organization that you have in Canada, and that condition of protection is the Federal Deposit Insurance system. Now how does it operate? I want to be sure not to tire you because I know you have been through a long program. The system was instituted as a system of temporary insurance which could exist during the time that it become necessary to lay the foundation for permanent insurance. It was at first thought that the system would remain temporary for six months, and at the end of six months, the permanent plan would go into effect. That would have been July 1st, 1934. Before July 1st, 1934 nearly all of the banks had come into the temporary plan and the temporary plan having worked so smoothly, an additional time being thought advisable before putting the permanent plan into effect, the temporary insurance was simply extended for another year. It would have expired on June 30th of this year. Then in the Congress last February there was introduced a Bill known as the Banking Act of 1935. The first title of that act is the title that re-writes the permanent provisions of the Bank Act of 1933 and incorporates the results of our experience with the temporary fund, and it does more than that. It enlarges

somewhat upon the original plan of the insurance. It enlarges upon it in this way. Under the original law the Federal Deposit Insurance Corporation was simply authorized to insure the depositor in all of the banks that were members of the Federal Reserve System. That meant some 900 odd state banks and all of the national banks and in addition to that, all of the other state banks that would elect to join the system. Better than ninety per cent of them did elect to join the system so we had to start off with you might say nearly all of the banks in the country insured in the temporary system. Now we were only authorized to insure and pay the loss. We had nothing to say about supervision. We began to think of the risk involved and of some of the dangerous practices that might result from indifferent management and that indifferent management might be due to some extent to the fact that in the event of loss the deposit insurance company would bear the loss and therefore the management would not feel quite so responsible as they otherwise would; so provisions were put into this law that give the corporation the power to say whether or not a bank remains a proper risk for insurance. Provision is also made for the insurance of new banks applying, or old banks that have not yet complied.

Originally the corporation was bound to insure every bank, if the bank were at the time solvent. It did not even need to have an unimpaired capital. If it had assets sufficient to meet its liability to creditor and depositor, it was incumbent upon the corporation to insure it; but now that the capital of the banks has been restored the corporation can no longer be reasonably expected to insure banks that have a bad margin of solvency. They are not required under this law to insure any bank whose capital is deemed inadequate. Furthermore the corporation may protect itself further against too many banks in any given community. It can look into the management. It can look into the conditions in the community to see whether there is a fair prospect for a bank and a fair margin for the bank in that particular community before it can be called upon to insure it. If unsound practices are indulged in the corporation can compel a correction of those unsound practices or it can drive the bank from the system. Meanwhile it will protect the depositors for two years to give them ample opportunity to adjust themselves to the uninsured condition of the bank. In some of the states where they have what is sometimes termed chain banking or branch banking, there is a noticeable tendency here and there to permit branches to be opened without sufficient capital. In other words the parent corporation spends its capital to pilot over an area in a state and it results in an unsound condition. If that bank be an insured bank, it may not create or set up another branch or chain and remain an insured bank without the consent of the corporation. Furthermore the original law did not provide for any examination except examinations during the period of temporary insurance; in the fall of 1933, during the months of October, November and December, examiners for our corporation examined over 7500 state banks for the purpose of determining whether or not they were eligible to become insured banks, whether they could meet the test of solvency. They were also authorized during the period of temporary insurance to reexamine those banks, if need be. No examining machinery was provided for the permanent plan of insurance, but under the Act of 1935 provision is made now for the examination of all banks. In order to accomplish that work of examination,

we had to work better than 2000 people in the examination of banks to qualify them for admission to the Fund on January 1st, 1934. Now we have something over 500 in our examining personnel and we have arrangements under which the examinations of our corporation are joined with the examinations conducted by the states and the expense of examination of banks has really been lower as a result of the examinations conducted by our corporation, because the examinations conducted by the states need not be as frequent as otherwise would be the case.

I just give you that brief outline to show you that one principle that is incorporated in this banking act of 1935 with respect to deposit insurance is the principle that banks, to remain a part of the insurance system, must be conducted with reasonable regard to safety, and consequently there is a degree of supervision.

Now in this matter of supervision, you and I realize, of course, that if you can take the entire supervision of banks and concentrate it in Washington, that you would have what we sometimes refer to as a unified banking system. It is debatable, of course, whether or not there should be that kind of unification. Some of the best experts in banking in the country have been looking forward for a good many years to the unified banking system. I know when the banking act of 1933 was passed, one of the most experienced men in financial matters in the country, now a United States Senator, said to one of the staff of the Federal Reserve, "Now we have done something. We have provided for the unification of the banking system. All banks will be members of the Federal Reserve System after July 1st, 1936. That will be forced in by the Federal Deposit Insurance." That Senator was a poor prophet. It is true a provision was put into the law that would have required all of them to come into the federal system by July 1st, 1936, but when the temporary plan was dated July 1st, 1934, that date was put forward another year—July 1st, 1937. Then in the Banking Act of 1935 it was entirely changed so that under this act no bank with deposits of less than a million dollars need ever to join the Federal Reserve System in order that it may continue to have its deposits insured by the corporation. If a bank has more than a million dollars of deposits, it will be required to join the Federal Reserve system by July 1st of the following year or it will have to terminate its relations with the insurance corporation. I call your attention to that technical detail merely to emphasize one point, that is this—the one force and agency in Washington today that is making for the unification, if you please to call it that, of the banking system of the country is the Federal Deposit Insurance Corporation. There are 6600 and some odd insured banks in this country. Congress said they need never join the Federal Reserve system but they must conform to the standards of safety that are laid down in this Act for the administration of the insurance system by the Federal Deposit Insurance Corporation, in order that they may continue to have their deposits insured; so that is one of the most important features, in my judgment, of this entire banking act of 1933. It has solved the banking system without unifying it under the Federal Reserve, as it were.

Now I have spoken to you in very rough outline, I think, with respect to the functions of the corporation, and particularly as they are affected by this banking act. I wonder if in your thought on deposit insurance you have associated in your minds the experience that we have

had here in this western country, in our state, in South Dakota, in Nebraska and Kansas or anywhere the state guarantee systems have been tried. I wonder if you are making comparison between those guarantee systems and the insurance system that is now being put into effect. If you are, your comparisons lead you nowhere because the analogy is not sound. The Federal insurance system has in it the element that could not be present in the state guaranty system, that is the element of spreading the risk. I told you about the great number of banks closing in this country between 1922 and 1932. Take our own experience during that period. When were our bank closings heaviest? They were heaviest in the early years, in 1920 to 1925. I suppose possibly two-thirds of our bank closings took place in that period, and I could give you a list of half a dozen states in which in that period there were in each of them more than 500 bank closings—North Dakota, South Dakota, Iowa, Minnesota, Nebraska, Kansas, Missouri, I think you will find in each of those states there were more than 500 bank closings during that period, and if there had been deposit insurance operating as the corporation is now operating, you may ask, would those losses have been paid? Yes, those losses would not only have been paid during that period, but each year there would have been additions to surplus. They would have been paid from a very moderate assessment upon the banks of the entire country, and there would have been additions to surplus each and every year, which would have helped take care of the more general bank closings which came along at a later time, because during the period when our banks were closing, in other parts of the country they were talking about prosperity. Whether they had it or not is debatable but their banks were not closing, if that is any evidence of prosperity. I give you that to merely demonstrate that the principle of spreading the risk can be applied with full force to an agency like the Federal Deposit Insurance Corporation, that spreads over the entire country.

Now what are the resources of that corporation? Our corporation drew as original capital from the federal government $150,000,000. Shortly after the first of January, 1934 we drew additional capital from the Federal Reserve banks to the extent of one half of the surplus of the year before in an amount equal to $139,000,000, so there was $289,000,000 of capital. That is all invested in government bonds and I might say to you that we have been somewhat frugal. We got into the market at a good time and there is $10,000,000 of appreciation in the value of the bonds our corporation owns today; in addition to that capital, we have the proceeds of the assessments levied upon the banks amounting to $40,000,000—$330,000,000 plus $10,000,000 of appreciation in investment. We do not carry that on our books that way, of course. Our losses have been very small. Naturally they would be small in a time like this.

There is set up today on the books of our corporation a credit to every bank which became a member of that temporary insurance fund. That credit is in the amount of the original payment; in other words, deposit insurance has been carried down to this moment and all of the losses have been met, all of the expenses of operation have been met, and deposit insurance has been carried down to this moment without the cost of a single dollar to a single bank in the country. The only thing it has cost the bank to this minute is the use of the money they

have contributed to the corporation, whatever that has been. That amount is set up as a credit. From here the story will be different because they were operating under the temporary plan.

We operate economically; we operate soundly. We paid all losses and expenses and there is a surplus left after giving to the banks one hundred per cent credit for the amount that they paid in but from here on the story is different. The story will be more like this—from here on the capital remains intact, $150,000,000 for the government and $139,000,000 for the Federal Reserve Bank, that remains intact. The banks will be compelled to contribute each year one-twelfth of one per cent; that will come in two payments, one-twenty-fourth of one per cent on the average deposit liability of the banks for each six months of the year. That will be a payment into the corporation that will accumulate, or be all paid out to meet losses as might be required. The estimated income to the corporation from that source will be upwards of $30,000,000 a year, somewhere between $30,000,000 and $40,000,000 that will accumulate now in addition to the capital and the payments from the banks. In the event of difficulties, the corporation is authorized to issue its own obligations to the extent of three times its capital. It may issue obligations to the extent of around a billion dollars, but of course, there is no provision in the law for a government guarantee of these obligations. We do not necessarily want to involve the government credit, but we do involve it to this extent, in the event of difficulty, the Secretary of the Treasury of the United States can be called upon to advance $500,000,000 of the obligations of our corporation, if necessary, to meet the losses in bank failures. In other words there is at the disposal of the depositors in the banks as a condition against loss a potential billion dollars. Now I think all of you will agree that that kind of condition is adequate protection, and of course, it has inspired confidence all over the country.

Another reason I don't want you to associate Federal Deposit Insurance with the type of insurance that we have been familiar in the western country under the guaranty system is because it has become the habit in some circles to offer to depositors, insurance or deposit guaranty as one of those nostrums that come out of the west. Don't let anybody tell you it comes out of the west. It comes out of the east. Did you know that one hundred years ago, yes more than a hundred years ago, every single element, every single principle that is involved in the present federal deposit insurance act was incorporated in the law of the greatest commercial state in the union? It was incorporated in the law of New York. Those were the days when banks were not used as banks of deposit as they are nowadays. Bank credit was used somewhat differently. The banks issued bills and those bills circulated in the community as currency and if you had occasion to use the credit of the bank, you put up your security at the bank, just as you do now, and instead of getting credit, which was called a deposit in the bank, against which you could draw checks, you got the bills and the bills circulated in the community. In other words, before banks became banks of deposit, they became banks issuing bills of credit that circulated in the community and accommodated their customers in exactly the same way, substantially as they now accommodate them. Now in order that those bills might circulate in the community, and that those who bought them would not suffer loss by reason of that kind of banking, they just deposited the money, dealing the same way in

bank credit. They next set up what they called a safety fund to secure any one to whom one of these bills would come, against loss in case of bank failure, and the outline of that safety fund in New York is the outline of the present federal deposit insurance act. In fact it is more like the one that was on the statute books until August 1933 than it is like the new Banking Act of 1935 because it provided for the banks to own the stock, and to represent their interest in the safety fund they were required also to pay an assessment into that safety fund, the same type of assessment that banks were required to pay into the insurance fund; and do you know that under that safety fund act of New York, which was nothing more or less than a deposit insurance act, there was not a dollar lost to those who dealt with the banks in New York state for more than twenty-five years? And the only reason that the Act was ultimately subrogated was when the Panic of 1857 came along. The New York court held there had been meanwhile a change in the relation of banks. There were reserve deposits in the banks on account of the changing methods of transacting business and the New York court held that safety fund originally designed to protect the circulation of banks and stand back of bank credit, to that extent was also liable to depositors and that put a burden on them, which they could not meet, and it went out of existence, so deposit insurance didn't come out of the west. It came out of the east.

Well I fear I am taking more of your time than your interest in the general subject warrants. However, I want to assure you that notwithstanding the misunderstanding that was somewhat prevalent before the insurance system was instituted in the late fall and the beginning of the year 1933 and 1934, the experience has been uniformly satisfactory. When you stop to think that at the meeting of the American Bankers Association in Chicago in the fall of 1933, yes in September of 1933, only a few months before the system of insurance actually went into effect, that body of responsible businessmen, leaders in the banking profession, seriously resolved in their resolutions adopted to call upon the President to postpone and not put into effect the insurance system because of the disastrous result that would follow—when you stop to think that that was only two years ago, and that only a few months after that, the system went into effect, and there is now scarcely a murmur in the entire banking world, something is taking place in the way of a constructive step that meets with general approval, and that adds immeasurably to the soundness and the safety of the banking system of this country.

I wish I had time to tell you some of the stories of the passage of the banking act of 1935. There is a lot of drama connected with that but I haven't time to tell you. I only want to say this, however, about it, that it gives one a sort of feeling that after all there is something in this country besides cynicism. There is a spirit that can recognize a situation, that can deal with it constructively. When anybody sneers at Congress and says that if Congress would only adjourn, or if Congress would only do this, that or the other thing, and speak of Congress as though it were a nuisance and almost intolerable to have to put up with it, it is just too bad that individual is not better enlightened. I might say I had somewhat of that feeling myself at one time, but the brief experience I have had in Washington has taught me different. You can go before the committees of Congress, the committees that are responsible for important legislation, and you can present any prob-

lem involved in the legislation in which you are interested, and find a more intelligent response in that essential than you can any place else in this country. I know, because in considering the Banking Act of 1935, it was necessary to go before the Committee on Banking and Currency in the House, a sub-committee to which it was referred in the House, and before the full committee in the Senate, and every feature of that was examined as by a microscope, and the clash of mind with mind, questions that were asked, discussions that were had, brought out an immense amount of information and engendered a really profound learning of the whole subject of banking. And then as we followed that legislation through and saw the climax in the Senate, when the bill somewhat modified—not so much as Title One, which is known as the Deposit Act, but somewhat modified in other respects,—when there was brought into the Senate a report by Senator Glass, I sat in the gallery that day. I heard his presentation of that committee report and my memory went back to other days in the distant past, when we thought there were giants in the Senate. The subject was so skillfully handled and presented in such a masterly way that you felt you were in the presence of great men dealing with a great subject in a big way; and that bill had been so thoroughly considered by that great committee consisting of 21 of the leading men of the Senate, that it was passed in the Senate without a single amendment, and when the conferees met and after eleven days of battle in Congress, they emerged with this present bill, there was such confidence on the part of both the members of the Senate and the members of the House in the work that had been done by these great men who were experienced and proficient in the subject that they were dealing with, that there wasn't a dissenting vote cast in either House against the acceptance of the conference report.

Gentlemen, it has been a great pleasure for me to have been here and give you this very brief outline, which will give you some conception, at least, I hope, of the operation of the Banking Act of 1935 and something of the operation of the corporation which I think is destined to be a mighty factor in building up of a sounder and safer banking system in this country.

PRESIDENT FOSTER: I thank you, Judge Birdzell, for the very splendid address. I don't suppose we need to make the Judge an honorary member of this Association, do we?

If Mr. Murtha has something he wishes to offer at this time, I will call on him.

MR. MURTHA: Mr. President, it occurs to me there is a new problem confronting us to which we should give some consideration. Aerial navigation in this country is growing with increased rapidity and naturally arising therefrom are many complex legal questions, which merit our consideration. The American Bar Association has been cognizant of this fact, and in connection therewith they have appointed a committee on Aeronautics which works for the formulation and enactment of uniform state aeronautical codes and also for the purpose of studying and considering pertinent questions in connevtion with aerial legal problems. Now, Mr. President, I am going to make a motion therefore that the President of the North Dakota Bar Association appoint a committee on aeronautical law for two purposes; first, to aid and assist in the formulation of the uniform aeronautics code,

and secondly, for the purpose of considering and reporting back to this association on pertinent questions in connection with aerial navigation.

PRESIDENT FOSTER: You have heard the motion, gentlemen, is there any second? (Motion duly seconded, submitted and carried).

There was some other young man here who wished to offer something at this time. Is he here?

MR. POWERS: I was unable to get here yesterday, but I was told there was some discussion as to the formation of a Junior Bar in North Dakota. I do not have this subject very well in hand due to the fact that I was not apprised of the fact that I was to be appointed chairman of the Junior Conference of the American Bar Association of North Dakota until a day or so ago, and if the chair would give me the time, I would like to go in very briefly to this Junior Conference of the American Bar Association.

PRESIDENT FOSTER: Go ahead.

MR. POWERS: This Junior Conference of the American Bar Association is formed as a separate section of the American Bar, the same as the section on Public Utility Law, Real Property Law, etc. It was formed a little over a year ago, I believe, at the Milwaukee meeting of the American Bar Association, and a meeting was held at that time, and a section meeting was held recently in Los Angeles. I have here some of the reports and remarks that were made of the meeting at Los Angeles, and one of the main projects considered at that Los Angeles Convention was a spreading and development of the Junior Bar through the state organization. One of the main objectives this year of the American Bar Association as a whole is the co-ordination of the American Bar and the state organizations. This is also true of the state Bar Association, and I would like to read a short paragraph from the address of Mr. Owen Cunningham, who was council member of the Junior Conference from the Eighth Federal Circuit:

> "Our first project, necessarily, should be the expansion of the idea—development of Junior Bar Sections in every state and metropolitan bar association and county and district association in the United States where it is practicable and feasible to do so. If the Junior Bar idea is worthy of effort for the benefit of the members of the American Bar Association under the age of 36, it should, likewise, benefit the individual members of local, district and state bar associations. Several states such as Iowa, Illinois, Pennsylvania, Florida, New Jersey and the District of Columbia and perhaps others, which have not yet come to my attention, have already organized Junior Bar sections within their state bar associations, and several local associations such as New York and Chicago have made considerable headway in this field. By stimulating the interest of the young lawyers and allowing them the opportunity to engage in an activity which they can claim as their own, we will produce an enlivened Bar in this country and soon we will have organization and professional consciousness which will bring untold benefit to our professional life."

Now this idea of junior organization is invading the country. There is the junior chamber of commerce. There are any number of organizations where they have their junior organizations. I think one of the ideas is that young men have problems peculiarly their own, and they are a little bit reticent to take them up in meetings such as this. Many members of the bar have practiced for years. Some of them we know by sight; some we see in court, and we are a little bit reluctant to speak for that reason. The other reason for junior organizations is the fact they have not much to offer but their services. For those reasons, these sections of various organizations have been formed.

I have here some by-laws of the Junior Bar Conference Section of the American Bar Association, which outlines the purpose of the junior bar conference as follows:

## PROPOSED AMENDMENTS TO THE BY-LAWS OF THE JUNIOR BAR CONFERENCE, A SECTION OF THE AMERICAN BAR ASSOCIATION

### *Article I*

### *Name and Purpose*

Section 1. This Section shall be known as "the Junior Bar Conference of the American Bar Association."

Section 2. The purpose of this conference shall be

A. To stimulate the interest of the young members of the American Bar in the objects of the American Bar Association, as defined in Article I of its Constitution, namely "to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation and of judicial decision throughout the Nation, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar."

B. To provide a program of activity designed to be attractive and helpful to such young members, and

C. To provide a better and more effective means of cooperation by junior bar organizations and of coordination of their work.

### *Article II*

### *Membership*

Section 1. The membership of this conference shall consist of and be divided into the following two classes:

A. All members of the American Bar Association in good standing not over the age of thirty-five years who have enrolled therein. The membership of a member of the conference shall terminate at the conclusion of the annual meeting of the Section next after he attains the age of thirty-six years, or upon his ceasing, prior to attaining that age, to be a member of the American Bar Association.

B. Delegates from Affiliate organizations, as such organizations are hereinafter defined in Article VII, as follows:

(1) Four delegates from each Affiliate organization which is organized as a section, committee or other part of any state bar association.

(2) Two delegates from every other Affiliate organization.

Each Affiliate organization shall select its delegates in such manner and for such term as it shall determine, but no delegate shall be seated unless the President or Chairman and Secretary of the organization he represents shall have certified to the Secretary of the Conference that he has been duly elected or appointed, that he is a member in good standing of the American Bar Association, and that he will not, during his term of office, become more than thirty-five years of age.

Section 2. Each member, provided he is at the time a member in good standing of the American Bar Association, shall be entitled to one vote in any election or on any matter coming before the Conference.

*Article III*

*Officers*

Section 1. The officers of the Conference shall be a Chairman, Vice-Chairman and Secretary, who shall be nominated and elected as hereinafter provided at each annual meeting of the Section, to hold office from the close of the annual meeting of the Conference at which elected to the close of the next succeeding annual meeting, and until their successors shall have been duly elected and qualified. Any member of the Conference in good standing shall be eligible for any office provided he will not, during his term of office, become thirty-six years of age.

Section 2. The powers and duties of the officers shall be as follows:

A. The Chairman shall preside at all meetings of the Conference at which he is present, shall present at each annual meeting of the American Bar Association, and to its Executive Committee from time to time, reports of the activities of the Conference during the preceding year, and shall perform such other duties as usually pertain to his office, or as may be assigned to him by the Executive Council.

B. Upon the death, resignation or during the disability of the Chairman, or upon his refusal to act, the Vice-Chairman shall perform the duties of the Chairman for the remainder of the Chairman's term except in case of the Chairman's disability and and then only during so much of the term as the disability continues.

C. The Secretary shall be the custodian of all books, papers, documents, and other property of the Conference, except money. (The Treasurer of the American Bar Association shall be the custodian of the money of the Conference). The Secretary shall be responsible for maintaining an accurate record of the membership of the Conference and shall keep a true record of the proceedings of all meetings of the Conference and of the Council. With the Chairman, he shall prepare and submit to the Executive

Committee of the Association a summary or digest of the proceedings of the Conference at its annual meeting for publication in the Annual Report of the American Bar Association. He, in conjunction with the Chairman, as authorized by the Council, shall attend generally to the business of the Conference. He shall keep an accurate record of all moneys appropriated to and expended for the use of the Conference.

Section 3. The officers shall be nominated and elected as follows: At the first session of each annual meeting of the Conference, the Executive Council shall elect a Nominating Committee of seven members of the Conference, not members of the Council, which committee shall make, and report at the first session on the second day of that meeting, nominations to the Conference for the offices of Chairman, Vice-Chairman and Secretary to succeed those whose terms will expire at the close of the then annual meeting. Other nominations for the same offices may be made from the floor at the session at which the report of the Nominating Committee is given. The election of officers shall take place on the third day of the meeting and shall be by written ballot.

Section 4. No person who has served as Chairman shall be eligible for re-election as Chairman. No person who has served as Vice-Chairman, shall be eligible for re-election as Vice-Chairman. No person shall serve as Secretary for more than two terms.

### *Article IV*

### *Executive Council*

Section 1. There shall be an Executive Council, composed of: the Chairman, Vice-Chairman, Secretary and the last retired Chairman (until he reaches the age of thirty-six years) of the Conference, all of whom shall be members *ex-officio* of the Council; and eleven members who shall be nominated and elected, one from each Federal Judicial Circuit and one from the District of Columbia, in the manner hereinafter provided in Section 3 hereof, for terms beginning at the close of the annual meeting at which elected and ending at the close of the second succeeding annual meeting, and until their respective successors shall be elected and qualify.

Section 2. The Executive Council shall have full power and authority, in the interval between meetings of the Conference to do all acts and perform all functions which the Conference itself might perform, except that it shall have no power to amend these By-Laws, and may not authorize commitments or contracts entailing the payment of more money during any fiscal year than shall have previously been appropriated to the Conference for such fiscal year. The Council, during the interim between annual meetings of the Conference, may fill vacancies in its own membership, in the office of Secretary, or, in the event of a vacancy in both the office of Chairman and Vice-Chairman, in the office of Chairman, and members of the Council and officers so selected shall serve until the close of the next annual meeting of the Conference.

Section 3. There shall be two regular meetings of the Council during each fiscal year, one during the annual meeting of the American Bar Association, and one, the time and place of which shall be fixed by

the Council. The Council may hold such additional meetings as may be called by the Secretary upon written request of four Council members. A majority of the Council shall constitute a quorum at any meeting thereof, and binding action shall be by majority vote of the members present. In the interim between meetings, action of the Council shall be by vote of the majority thereof, communicated in writing to the Secretary, whose duty it shall be to submit in writing to the Council any resolution proposed by any member thereof, to keep an accurate record of all resolutions which may be proposed and the action of each member of the Council thereon, and to keep the Council advised of such action.

Section 4. Five members of the Executive Council (one each from the Seventh, Eighth, Ninth and Tenth Federal Judicial Circuits, and one from the District of Columbia) in 1936 and in all subsequent even-numbered years; and six members (one each from the First, Second, Third, Fourth, Fifth and Sixth Federal Judicial Circuits) in 1937 and all subsequent odd-numbered years, shall be nominated and elected in the following manner:

A. At the first session of each annual meeting of the Conference those voting members of the Conference residing in each Council District entitled at that annual meeting to elect a member to the Council, shall select, in such manner as they shall respectively determine, from members of the Conference not more than thirty-four years of age residing in the Council Districts entitled at that meeting to elect members to the Council, a nominee or nominees for the office of member of the Council. The names of the nominees so selected shall be announced to the Conference at the second session following which announcement further nominations may be made from the floor. The Secretary shall then prepare written ballots presenting the names of all nominees for members of the Council. The election of the Council members shall take place at the third session by the written ballots prepared by the Secretary as hereinabove provided. Each member of the Council present at such session shall be entitled to vote in said election.

Section 5. If any elected member of the Executive Council shall fail to attend two successive meetings of the Council, the office held by such member shall be automatically vacated, and the Council shall fill the vacancy for the unexpired term by electing a successor who shall be a member of the Conference in good standing not more than thirty-four years of age residing in the same Council District as his predecessor. Said successor shall take office immediately. No person shall be eligible for election as a member of the Executive Council if he is then a member of the Council and has been such member continuously for a period of three years or more.

*Article V*

*State Chairmen and Subchairmen*

Section 1. The Chairman shall appoint, from the Section's membership in each state of the United States, in the District of Columbia, in the Territory of Alaska, the Territory of Hawaii and the Territory of Puerto Rico, a State Chairman;

Section 2. Each State Chairman shall serve until the close of the annual meeting following his appointment, provided, however, that the State Chairman shall in any event cease to hold office upon reaching the age of thirty-six years, and provided further, that he may be removed from office by the Chairman only with the consent, in writing, of the Council member from the Judicial Circuit in which the State Chairman resides.

Section 3. Each State Chairman shall be in charge of, and responsible for, the execution of the program of the Conference in his State, Territory or District, and shall perform such duties and exercise such powers as may be assigned or delegated to him by the Council. He shall in all instances cooperate closely with the member of the Executive Council from the Circuit in which he resides, with the Committees of the Conference and with the Affiliate organizations of his State. He shall report on the progress of the Junior Bar Section program at such time or times as the Chairman may require. Upon ceasing to hold office he shall promptly deliver all papers, documents, communications and files pertaining to the Conference and its activities to the person designated as his successor.

Section 4. The State Chairman may appoint from the membership of the Conference of his State, Territory or District, with the consent of the Executive Council member from the Judicial Circuit in which he resides, such city and county sub-chairmen as the State Chairman shall deem necessary for the execution of the program of the Conference. Such sub-chairmen shall serve during the pleasure of the State Chairman, and under his direction. They shall perform such duties as the State Chairman may assign to them, and shall cooperate, whenever requested so to do, with the various committees of the Conference.

Section 5. No State Chairman or subchairman shall have authority to incur any liabilities in the name of the American Bar Association or of the Junior Bar Section, nor shall any action taken by him without the express authorization of the Council bind the Section.

## *Article VI*

## *Committees*

Section 1. The Chairman shall appoint such committees as the Executive Council may authorize, each committee to consist of five members (unless otherwise specifically indicated by the Council), to serve to the close of the annual meeting following their appointment and until their respective successors are appointed, and to perform such duties as the Executive Council shall prescribe, subject to the limitations of these By-Laws and the Constitution and By-Laws of the American Bar Association. The Chairman shall designate the committee chairman and shall announce the appointments to the Secretary of the Conference, who shall give notice to the persons appointed.

Section 2. The Chairman shall have power to fill vacancies in any committee.

Section 3. A majority of the members of any committee shall constitute a quorum.

*Article VII*

*Affiliate Units*

Section 1. Any Junior Bar Association or Junior Unit of any bar association in which membership is restricted to lawyers in good standing not more than thirty-five years of age, shall, upon written request to the Secretary of the Conference, duly authorized by such Junior Bar Association or Junior Unit, be enrolled as an affiliate organization of the Conference.

Section 2. Each application for enrollment as an affiliate organzation shall be accompanied by a certified statement from the Secretary of the applicant organization which shall contain the names and addresses of the officers of such applicant, a copy of the provisions of its by-laws or articles relating to membership, and the names and addresses of its members who are members of the American Bar Association. The Secretary of each affiliate organization shall promptly certify to the Secretary of each affiliate organization shall promptly certify to the Secretary of the Conference all subsequent changes in the information contained in such statement.

Section 3. Any Junior Bar Association or organization affiliated with the Conference which shall remove or modify its restrictions on the age of its members, except to lower the maximum age limit for membership, shall thereupon cease to be an affiliate organization, and it shall thereupon cease to be entitled to send delegates to the Conference.

*Article VIII*

*Meetings*

Section 1. The annual meeting of the Conference shall be held immediately preceding and/or during the period of the annual meeting of the American Bar Association, as the Executive Committee of that Association may direct, and in the same city or place where such annual meeting of the American Bar Association is held, with such program and order of business as may be arranged by the Council subject to the approval of the Executive Committee of the American Bar Association.

Section 2. Special meetings of the Conference may be called by the Chairman upon approval of the Council at such time and place as the Council may determine, and may be either general meetings of the entire membership of the Conference or meetings of the members from a particular State, Judicial Circuit or other geographic division of the United States or its territories.

Section 3. The members of the Conference present at any meeting shall constitute a quorum for the transaction of business.

Section 4. All binding action of the Conference shall be by majority vote of the members present cast at a general meeting of the Conference, except as otherwise provided hereinabove in Article IV, Section 2.

*Article IX*

*Miscellaneous Provisions*

Section 1. The Fiscal year of the Conference shall be the same as that of the American Bar Association.

Section 2. All bills incurred by the Conference, before being forwarded to the Treasurer of the American Bar Association for payment, shall be approved by the Chairman or the Secretary, or, if the Council shall so direct, by both of them.

Section 3. No salary or compensation shall be paid to any officer, member of the Council, or member of a committee.

Section 4. Any action by the Section shall be approved by the American Bar Association before the same becomes effective as the action of the American Bar Association. Any resolution adopted or action taken by the Conference may on request of the Conference or the Council be reported by the Chairman of the Conference to the Executive Committee of the Association for action thereon by the Committee or the Association, according to the By-Laws of the Association.

Section 5. All printing for the Conference or for the Council or any committee of the Conference shall be done under the supervision of the headquarters office of the American Bar Association.

Section 6. The Council, with the prior approval of the Executive Committee of the American Bar Association, shall have authority to accept donations to be applied to special lines of work within the purposes of the Conference, which donations shall be paid to the Treasurer of that Association for custody and disbursement, and the amounts of and the names of the donors of which shall be reported to the Conference by its Chairman at its annual meeting.

Section 7. The Conference shall annually report its proceedings and recommendations to the American Bar Association, and to all Affiliate organizations.

*Article X*

*Amendments*

These By-Laws may be amended at any annual meeting of the Conference by a majority vote of the members of the Conference present who are entitled to vote and voting, provided such proposed amendment shall first have been approved by a majority of the Council and provided, further, that no amendment so adopted shall become effective until approved by the Executive Committee of the American Bar Association.

## ADDRESS BEFORE JUNIOR BAR CONFERENCE OF AMERICAN BAR ASSOCIATION, LOS ANGELES, CALIFORNIA, JULY 16, 1935

By OWEN CUNNINGHAM

*Council Member, Eighth Circuit, J.B.C.*

It is an extreme pleasure for me to have the privilege to appear on the program and respond, in behalf of the membership of the Junior Bar Conference, to the address of our genial secretary, Mr. Roberts. He has presented for your consideration a definite program and one which should provoke serious thought from the conference members present. It is regrettable that the members of the American Bar Association, attending the convention, were not present to hear his valuable

suggestions. It is my purpose to supplement what has been said and to emphasize some of the points made and to suggest to you some matters which I consider of equal importance with those suggested and which deserve our immediate thought and effort, rather than to controvert what has been said or to argue the merits of the points suggested.

In presenting this subject of the Program of the Junior Bar Conference for 1935-1936, I submit a four point program which embraces the suggestions made and extends farther into the activity which the Junior Bar Conference should promote. The committees of the American Bar have done much to lead the way and show us the need which exists and the opportunity which awaits us for service to our profession and to our communities. We must always endeavor to keep our activities within the ideals and purposes of the American Bar and strive to attack the problems which confront the profession from the point of view of the younger members of the legal profession. Let us express a sympathetic attitude toward our fellow lawyers, through our program and our actions, rather than a critical attitude which is so often expressed by our elders. We must urge the young members of the bar to adhere to the rules of ethics and the professional conduct fitting to the members of the bar. Let us inform the young lawyers of the purposes for bar association activity and offer to them some explanation of the program as soon as possible after they enter the legal profession. This is an ambitious undertaking, but we owe it to our profession to see that it is done. Let us not criticise but let us build our profession from the new material coming to it year by year and, in the meantime, adopt a system of vigorous prosecution of grievances, strict enforcement of our code of ethics and, through our example and professional attitude, inspire a more favorable public relation. We can do this.

My first suggestion then is—let us not criticize our fellow lawyers, but let us help them and let us help the ones who are starting. They require our guidance and they will react to our advice, our example, and our admonitions. In line with this suggestion, let us present a constructive program which will have appeal to the young members of the bar, which will embrace all phases of bar association activity and will emphasize the real purpose of bar association activity. We must provide the energy and initiative to carry out such a program successfully.

As the first factor in the four-point program, I would suggest the development of the social phase of Bar Association activity. We have a good start. Milwaukee entertained the young lawyers royally and we all have pleasant memories of the good time. Already we know that Los Angeles is going to excel in providing selective entertainment. More of our lawyers will look forward to the annual meeting where friends are met and good times provided, if we plan for extension of the entertainment program. The young lawyers are excellent hosts and the social side plays a large part in the appeal of Bar Association to its younger members. Let us extend our entertainment programs, but keep them on a high level in accordance with the high standard which we hope to maintain. However, we must not permit the social side to dominate the program at our convention gatherings.

Our convention program should embrace a thorough outline of the problems peculiar to the younger members of the bar, a prepared and

open discussion of solutions to these problems and unlimited opportunity for suggestions from the members of our Junior Bar Conference in attendance. We are seriously affected by the evils presented in the unauthorized practice of the law. We are in a position to appreciate the development in the program on Legal Education and Admissions to the Bar. We should interest ourselves in the crime problem and the elimination of the lawyer criminal and take every opportunity to make it known publicly that the young lawyer of today in no manner condones the acts of the shyster and the disreputable lawyer. Let us approach these subjects from our own standpoint and solve them in our own way. Our convention program should, in the future, anticipate open discussions of current topics which are affecting the professional well-being of the members of the bar. We hope to enjoy long and honorable careers. It is to our advantage to advocate reforms and outline programs to bring them about. Our convention program is the dynamo which generates power and is a medium to attract the attention of the members of our profession who never take interest in bar association programs or membership. Let us, then, make our convention programs provide an opportunity for open discussion of subjects by our own members on topics of policy and other subjects upon which differences of opinion abound and which will arouse and stimulate and maintain the interest of our membership in association activity. Controversy is a great stimulant.

As a second factor in my program, I would stress Convention Program, dealing with subjects peculiar to the younger members of the profession, which arouse interest, stimulate members to action and provide sufficient opportunity to service so that the profession as a whole will be benefited. There is a great lack of activity in bar association programs, due either to a lack of a definite objective, want of alert leadership or lack of desire to increase or elevate the professional standing of the membership of the bar.

For committee work I believe that the committees should be assigned a definite set of subjects for consideration and effort for the first year rather than allowing them to branch out into special subjects for consideration of the young members of the profession. We should not try to supplement the academic phase of the American Bar program or duplicate or parallel their efforts in research and legislative matters, but we should cooperate with them in all their section work. We need all the committee workers centering their attention upon the extension of the Junior Bar movement in the United States and the different phases of our expansion which includes principally, membership in the American Bar. We must have members and to do this a campaign must be staged during this next year to increase the membership of the American Bar and to enroll all of the good and reputable young lawyers of the nation. Although we cannot ever hope to say that the association represents the thought and voice of the older members of the bar, we can lead to the desired goal by enrolling the younger members in the Junior Bar conference so that we can assert that the Junior Bar represents the thought and voice of the younger members of the profession. Most lawyers consider it an opportunity when they are invited to join the American Bar Association. It is a mark of distinction, and few lawyers with any pride for their profession and standing will deny themselves the privilege when in-

vited by some reputable member of their local bar. We should adopt a slogan for the coming year, expressive of the idea that all good, reputable lawyers should belong to the American Bar Association. We should make it desirable for them to belong and attach more significance to membership by developing association consciousness among the members of the bar. It takes members for activity and we should make this the basis for one phase of our committee work. We have attacked the problem of Unauthorized Practice of the Law and we realize that the American Bar Association Committees on this project have performed an outstanding service, but the real estate man, the notary public, the collection agent, the abstracter and the ambulance chaser must be eliminated from the practice of law, as fees diverted by these unauthorized practices affect the income of the lawyer during the first few years of his practice. We have, likewise, attacked the problem of Bar Integration which contemplates a self-governing bar, compulsory membership in bar associations, financed committee work and vigorous prosecution of grievances. Bar Integration has already been adopted in seventeen states and has improved the standing of the bar in localities where the statutory machinery for Bar Integration has been enacted. We should continue our efforts in this phase of the work until the task is completed. The problem of Criminal Law presents an opportunity for the young lawyers to come to the front and advocate and sponsor legislative enactments raising the qualifications for public prosecutor and adoption of needed reforms in pardon and parole. The committees working on these topics, together with the organization and development of the Speaker's Bureau should be continued, stimulated and invigorated, for through this work we can do more for the profession than through any other means yet suggested. As my third point then I would adopt as committee activity for the coming year—Membership, Bar Integration, Unauthorized Practice of the Law, and Criminal Law and its Enforcement and carry this program to the public and to the bar through the channel of the Speaker's Bureau already inaugurated.

Having considered three phases of my four-point program, the Social Aspect, Convention Program or Speaking and Discussion Elements, and The Committee Effort, I come to the projects which the Junior Bar should consider and study, and if met with approval, adopt for effort during the coming year as logical subjects for our program.

Our first project, necessarily, should be expansion of the idea—development of Junior Bar sections in every state and metropolitan bar association and county and district association in the United States where it is practicable and feasible to do so. If the Junior Bar idea is worthy of effort for the benefit of the members of the American Bar Association under the age of thirty-six, it should, likewise, benefit the individual members of local, district and state bar associations. Several states such as Iowa, Illinois, Pennsylvania, Florida, New Jersey, and the District of Columbia, and perhaps others which have not yet come to my attention, have already organized Junior Bar sections within their state Bar Associations, and several local associations such as New York and Chicago have made considerable headway in this field. By stimulating the interest of the young lawyers and allowing them the opportunity to engage in an activity which they can claim as their own, we will pro-

duce an enlivened bar in this country and soon we will have organization and professional consciousness which will bring untold benefit to our professional life.

As a second project which can be classified as a long time activity, we can recommend to the various Bar Associations a schedule of fees. Illinois has already recommended a schedule of fees after considerable study and thought on the part of a committee which has been working for years on this subject. This project has a great deal of merit. Other projects which we can and should study are: "Selection and Reforms in Elections of our Judiciary." This has been the subject of considerable discussion and activity in certain localities and, particularly, California, where outstanding leadership has been shown in this field. "Interstate compacts on Extradition for certain crimes." "Adoption of a Ceremonial Procedure upon election to Bar Association Membership and the adoption of a proper title for lawyers in the United States." As a doctor has the title, "Dr." the minister has the title "Reverend" so should we adopt some similar title indicative of our profession.

A third subject which has caused me considerable time and effort is the problem of the immigrant attorney. Most of our states are still operating under obsolete statutory provisions relating to the admission of immigrant attorneys and this is a subject upon which the Junior Bar could well afford to spend considerable time. The requirements are too low in most states, the license fee for transfer is too small and the investigation of those affected is shallow. We should reform our immigrant attorney laws and should do it now.

Much has been said in recent years concerning the adoption of a probationary period for lawyers. To point out a few of the evils which this might correct will be time well spent. Too many lawyers are admitted to our profession with no intention of entering the practice. Many lawyers enter the profession and later abandon it for other fields of endeavor. Many members of the bar, it is discovered, should never have been allowed to remain, but disbarment is too embarrassing and expensive and, in most instances, ineffective. Yet it is a known fact that many of our members are unfit mentally and otherwise to bear the name lawyer or advocate.

During times of depression many men who have a license to practice law but who had abandoned it for other means of livelihood return to the profession and divert fees which should honestly go to the lawyer who has followed his profession through an honorable career. Any system which could in a measure correct some of these evils has a place in our list of reforms and I submit this project for your consideration and study.

Never in my opinion has an organization of professional men had greater opportunity for service than has the Junior Bar Conference of the American Bar Association. The profession needs your energy and initiative and the public will welcome your interest in the association activity. We must contribute our fair share of time, effort and, sometimes money to our professional development and follow through with our program in order that the Bar of a quarter of a century from today will enjoy greater public confidence and better professional privileges than the bar of today affords.

MR. POWERS: (Continuing).

Inasmuch as this was discussed yesterday, I shall not go into it further, but I wanted to bring this matter up to show how this activity is going on in other states, and in the American Bar Association, and if it is taken up by this state, it would not only help North Dakota as a state organization, but it would help the American Bar Association. I might say that members of the profession who have not practiced more than four years are eligible to membership in the American Bar Association for an annual fee of $4, which is half the rate for one who has practiced for five years or more, and I think if the Junior Bar conference is sponsored in the state, it will promote membership in the American Bar Association, and it will also promote attendance at state conventions by the younger members of the bar. I have brought this up, not with the idea of making any motion, but merely to call it to the attention of the members present, as I understood it had been discussed.

MR. FOSTER: Thank you, Mr. Powers, for your information. Mr. Van Osdal of Fargo was appointed as chairman of the committee for the Junior Bar. He has had the matter up with most of the young lawyers of the state and he has asked that this committee be continued. Colonel Hildreth, the incoming President, has said that he would continue that committee for another year. For your further information, it is my understanding that the idea of the junior bar in this state has not met with much favor among the younger members themselves. They do not want to be placed back in the primary school; they prefer to stand on their own feet with the rest of the lawyers. I give you the attitude as reported to me so you are going to have some job on your hands.

JUDGE BRONSON: It might not be so much trouble on this junior bar business if you recognize the section idea. In other words, supposing they had a state bar meeting like they have on here and supposing you had a section like they have with the medical association, like the American Bar Association has its sections, given a standing the same as this state bar has a standing, no inferiority complex involved at all, it is part of it, it is a section of it. If that section idea is carried along by Colonel Hildreth, these young fellows can be given a chance to talk among themselves and work out their own problems and become a part of us.

PRESIDENT FOSTER: Yes, Judge, I didn't advance any theory of my own. I advanced it only as reported to me by the young men themselves. There has been a sincere effort along that line in the past year. I think it is a problem which the younger members will work out and I am sure the Association will cooperate with them in anything they want to do.

We have next the report of the committee on Constitution and By-laws. Is there any filed, Ben? I will ask Mr. Tillotson to read it. If you get tired of it any time, if you want to make a motion to refer it at any time, we will listen to that.

SECRETARY TILLOTSON: This is the report of the Committee on Constitution and By-laws. It is a rather long report and recommends some amendments to the Constitution and a number of amendments to the By-laws under the Constitution. The amendments to the constitu-

tion may not be considered at this meeting but at some meeting subsequent to that meeting at which the amendments are proposed.

MR. LEWIS: In view of the lateness of the hour, and also due to the fact that amendments to the constitution cannot be considered this year, I move that this report be printed in the proceedings of this Association and so submitted next year, if you hold that to be proper.

PRESIDENT FOSTER: I will hold that as proper. (The motion was duly seconded, submitted and carried.)

## REPORT OF THE COMMITTEE ON CONSTITUTION AND BY-LAWS.

Your committee on Constitution and By-Laws of the State Bar Association had before it and considered the following matters, and reports and makes the following recommendations:

The Amendment to Article 3 of the Constitution.

We recommend that article 3 of the Constitution, relating to membership, be amended to read as follows:

### *ARTICLE* 3

Membership: The membership of this association shall consist of all practicing attorneys who have paid their annual dues and received their license from the clerk of the State Bar Board, of the State of North Dakota, and shall be entitled to all the rights and privileges of the Association and to vote and participate in the business transacted at its meetings. All other attorneys who have been duly admitted to practice by the supreme court of this state and are by law exempt from the payment of dues and annual license fees, or who have voluntarily retired from the practice of law shall be entitled to all the rights and privileges of the association, except the right and privilege to vote and hold any office in the association. Honorary membership in this association may be conferred at any meeting upon any foreign or non-resident attorney at law, as a mark of distinction, who shall be entitled to all the rights and privileges of the association except that of voting and holding office in the association."

Your committee is of the opinion that the State Bar Association was created and intended to be an association of practicing, resident attorneys, and for the benefit of practicing attorneys; and that the provision of Section 813a1, Suppl. 1925, and any other statutory provisions, do not prohibit the association from restricting the qualifications for votting and holding office in the association.

Amendment to Article 4.

Your Committee recommends that article 4 of the Constitution be amended to read as follows:

### *ARTICLE* 4

Officers: The officers of this Association shall be a President, a Vice-President, a Secretary, and a Treasurer, who shall be elected at the annual meeting of the Association and hold their office until the next annual meeting succeeding the election; and, provided, that no member of this Association shall be elected to any such office who is not an active practicing attorney; and, provided further, that any member of this Association, while he is holding any public office which

charges him with the devotion of his entire time to the performance of the duties of such office, shall not be eligible to vote or to hold any of the aforesaid offices.

Amendment to Article 8 of the Constitution.

Your Committee recommends that Article 8 of the Constitution be amended to read as follows:

*ARTICLE* 8

Standing Committees: It shall be the duty of the president to appoint, with the concurrence of a majority of the executive committee, such standing committees of the Association, as may from time to time be provided for by the By-Laws of this Association, such appointments to be made immediately after the annual meeting each year, and such other committees as may be deemed necessary by him from time to time, with the concurrence of the executive committee."

The adoption of the above amendment to the Constitution is necessary to carry out the provisions of the late 1933 amendment to the Constitution, as amended by Article 5, and the powers and duties, as provided by late amendments to the By-Laws, of the Executive Committee, and also Article 7 of the Constitution, relating to the Executive Committee.

## AMENDMENTS TO BY-LAWS

*Amendment to Article 5 of By-Laws*

Your Committee recommends that Article 5 of the By-Laws be amended to read as follows:

*ARTICLE* 5

Standing Committees: There shall be appointed annually by the president, with the concurrence of a majority of the executive committee, immediately after the annual election, the following standing committees, each to consist of five members, to serve for the year ensuing and until their respective successors are appointed:

1. On Automobile, Aeronautical and Transportation Laws;
2. On American Law Institute;
3. On Bar Representatives on Judicial Council of the American Bar Association;
4. On Citizenship and Americanism;
5. On Comparative Law and Re-statement of the Law;
6. On Constitution and By-Laws;
7. On Criminal Law and Law Enforcement;
8. On Ethics and Grievances of Bar and Bench;
9. On Jurisprudence and Law Reform;
10. On Judiciary, and on Selection of Judges;
11. On Legislation, State and National;

12. On Legal Education and Admission to the Bar;

13. On Legal Aid Work;

14. On Local Organizations;

15. On Memorials;

16. On Press and Public Information;

17. On Public Utilities and Service Companies;

18. On Unlawful Practice of Law, and on Internal Affairs.

Section 2. The President shall appoint, with the concurrence of a majority of the executive committee, the chairman of each of the aforesaid Committees, and the Secretary shall give notice immediately to the persons appointed on each committee. The duties of each committee may be prescribed by the Executive Committee to have force and effect until the duties of each of the aforesaid committees are duly defined by By-Laws of this Association. That three weeks prior to the date of the annual meeting each committee shall file its report with the secretary of this Association; and that upon the filing of the reports and statements the secretary shall cause the same to be printed or typewritten, and he shall forthwith mail a copy to each member of the Association. (End).

Your Committee recommends the adoption of the proposed amendments, Sections 1 and 2, Article 5 of the By-Laws, and to take the place of Article 5, for the reason that there now exists an uncertainty and confusion as to just what and how many committees are to be appointed by the president and executive committee. Article 5 provides for only 3 committees, and there has been no legally adopted By-Law increasing that number. The Executive Comittee recommended that 13 additional committees or sections be added, and on Motion the Committee's Report was approved, at pages 13, 14 and 15, of the Proceedings of the Bar Association of 1924. In the 1934 ANNUAL, the president and executive appointed 19 standing committees, which includes Bar Representatives on the Judicial Council of the American Bar Association. The said 13 additional committees contained in the Report of the Executive Committee were appended at the end of the Constitution and By-Laws, as found at pages 221-227, of the 1927 Annual, with the statement that same had not been adopted as a part of the By-Laws.

*New By-Law Proposed, Article 9*

Your Committee recommends and proposes for adoption a new By-Law, as Article 9 of the By-Laws, to read as follows:

*ARTICLE 9*

Section 1. Board of Editors.—The official organ or publication of this Association shall be conducted by a Board of Editors consisting of three members, two of which shall be elected annually by this Association, and one shall be chosen by the faculty of the University Law School. The Editor-in-Chief shall be chosen by the Board of Editors; and shall hold his position or office at the pleasure of the Board; and be a member and secretary of the Board during his term of office; and must be an attorney-at-law.

Section 2. Title of Official Organ and Editing. The Board of Editors shall designate the title of the official organ of this Association; provide for its printing and distribution; and shall supervise the editorials, notes, articles and contents generally, as published therein. That no personal strictures or defamatory articles or references are to be published therein, in any way reflecting upon any member of this Association.

Section 3. Management—Reports—Vacancies. The Board of editors may employ such assistance as is necessary to properly prepare, print and publish such official organ. That it shall have charge of its financial affairs, and receive and disburse all money or funds set aside for the expenses of the publication of said official organ; and the treasurer of the Association shall be the treasurer for said Board, and that all moneys and funds received from advertisements and other publications or notices published and printed in said organ, including all moneys and funds received from any other source, shall be deposited with the Treasurer of this Association, and drawn out on the check or order of the chairman of the Board of Editors and countersigned by the Secretary of the Board, upon authorization of the Board as ordered in the minutes of its meetings. But no money or funds shall be drawn out of the treasury of the Association exceeding the amount or sum appropriated each year by the Executive Committee of this Association. That said Board shall report as to the management of its financial affairs to the executive committee whenever called upon by that committee to render an itemized accounting of its affairs; and must file an annual report of its financial affairs and management, and showing in detail all its receipts and expenditures, at least three weeks before the annual meeting. Vacancies upon the Board of Editors shall be filled by the Executive Committee or the Faculty of the University Law School, as the case may be.

*New By-Law Proposed, Article* 10

Your Committee recommends and proposes for adoption as a new By-Law, and as Article 10 of the By-Laws, to read as follows:

*ARTICLE* 10

Member of General Council.—That there shall be elected by this Association a representative and Member of the General Council of the American Bar Association, who shall hold office until the next annual meeting succeeding the election; and this member shall be the accredited representative of the State Bar Association to the American Bar Association, and whose duties shall conform to those prescribed by the American Bar Association and by the State Bar Association. That the actual expenses of said member of the General Council while in attendance at the annual meeting of the American Bar Association shall be paid by this Association.

The above proposed amendment, Article 10 to the By-Laws, is in accord with the recommendations made at the last annual meeting of the American Bar Association, and comments upon it recommending the passage of such a By-Law by the State Association can be found in the Journal of the American Bar Association of August, 1935, and especially set out on page 547. The purpose is as stated in that article to make the American Bar Association more representative and

in accord with the progressive changes in social and economic conditions, and to make the Bar more representative than it has been in the past. In other words, the State Bar Association and also the American Bar Association had become too conservative and controlled by too few of its members; and this is the general criticism made of existing conditions. We believe in progress, therefore, we recommend it as requested by our Vice President, Col. M. A. Hildreth.

Your Committee, on Constitution and By-Laws, moves the adoption of the foregoing report; and that the Proposed Amendments to the Constitution be placed upon the Calendar for final vote and passage at the next Annual Meeting of this Association.

Your Committee moves the adoption of all the proposed Amendments to the By-Laws including the New Proposed By-Laws, as above set forth, at this Annual meeting, so as to be in force and effect immediately.

Dated, at Bismarck, N. D., August 23, 1935.

Report submitted by:
L. J. WEHE, Chairman

The undersigned recommend the adoption of the above report of the Committee on Constitution and By-Laws, except as to the proposed amendments to Article 3 and Article 4 of the Constitution, and which proposed amendments limit the rights and privileges of certain non-active members of the legal profession and denying them the right to hold office and vote.

August 25, 1935.

L. T. SPROUL,
JOHN KNAUF
Committeemen.

## ADDENDUM.

The above Report having been approved by your Committee, except as to the two proposed amendments to Articles 3 and 4 to the Constitution, we wish to call your attention to the fact that a former Committee consisting of P. R. Bangs, T. A. Toner and Clyde Duffy, recommended practically the same thing as now proposed by your committee, Report found at page 25, 1932 Annual, restricting the right to hold office to active practicing attorneys; and that Committee reported further that we had a right to make such restrictions.

Besides this, there are no good reasons why the non-active members should not pay the annual license fee of $10.00, and help support the Association, if they wish to enjoy all its rights and privileges. There are 50 non-active members, or more, as listed in the Bar Board 1935 List of Licensed Attorneys, who pay no license fees; and we would restrict their membership rights, or have them to pay the same fee the rest of us have to. It was a mistake to exempt them in the first place, as the total comes to $500.00, or over, this year.

August 29, 1935. L. J. WEHE, Chairman.

# CONSTITUTION AND BY-LAWS OF THE STATE BAR ASSOCIATION OF NORTH DAKOTA AS AMENDED

Compiled by L. J. Wehe

Creation of Bar Association: In compliance with the provisions of an act passed at the 17th session of the Legislative Assembly of the state of North Dakota, approved March 11, 1921, entitled "An Act to Create, Define and Establish the Bar Association of the State of North Dakota," and for other purposes incident thereto, the membership of the Bar Association of North Dakota, in annual session assembled, adopts the following constitution and by-laws:

*Article I*

Name: The name of this association is the Bar Association of North Dakota.

*Article II*

Objects: The objects of this association shall be to promote the administration of justice, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the State Bar.

*Article III*

Membership: The membership of this association shall consist of all practicing attorneys who have paid their annual dues and received their license from the clerk of the State Bar Board, of the State of North Dakota, and all other attorneys who have been duly admitted to practice by the supreme court of this state and are by law exempt from the payment of dues, and all such members shall be entitled to all the rights and privileges of the association and to vote and participate in the business transacted at its meetings.

(Sec. 813a1 of 1925 Suppl.)

*Article IV*

Officers: The officers of this Association shall be a president, vice-president, and secretary-treasurer, who shall be elected at the annual meeting of the Association and hold their offices until the next annual meeting succeeding their election.

*Article V*

Executive Committee: The executive committee shall consist of the president and vice president of this association and the presidents of the several district bar associations of the state as such districts are now or may hereafter be organized. In the event that any such district bar association shall not have a duly elected president then the president of this Association shall appoint, from the territory covered by said district bar association, a member for said executive committee. The representative of such district bar association shall serve upon such executive committee until the next annual meeting of this association, notwithstanding the election of a new president of such district bar association. The Secretary-Treasurer of this Association shall act as secretary of the executive committee but he shall have no vote.

(Amendment Adopted Annual Meeting 1933, Pages 32-38.)

*Article VI*

Duties of the Officers: The duties of the officers of this Association shall be such as usually devolve upon officers of like organizations.

*Article VII*

Duties of the Executive Committee: The duties of the executive committee shall be such as may from time to time be imposed upon it by the by-laws of this Association.

*Article VIII*

Standing Committees: It shall be the duty of the president to appoint such standing committees of the Association as may from time to time be provided for by the by-laws of this Association, such appointments to be made immediately after the annual meeting each year.

*Article IX*

Referendum: Whenever a petition signed by not less than thirty members of this Association shall be presented to the president, asking that a vote of the members of the Association be had on any measure affecting the public interest, state or national, or by way of indorsement of candidates for judicial or other office, the president and executive committee shall forthwith and within ten days provide for the submission of such question or measure to a vote of the members by the postal ballot, the details of which shall be prescribed by the executive committee. Such referendum shall be by secret ballot and thirty days from date of mailing, the ballots shall be allowed for completion of the votes. At the expiration of that time the ballots shall be canvassed by the president and secretary, and by a judge of the supreme court or district court to be selected by the president, and the result shall be published at the capital of this state. No expression of approval or disapproval by this Bar Association on any such measure or candidacy shall be given in any other manner.

*Article X*

Amendments: This constitution may be amended at any annual meeting by a two-thirds vote of the members present upon amendments which have been suggested at a previous annual meeting, or amendments which have been suggested at the next preceding annual meeting.

(See page 19, 1921 proceedings)

*Article XI*

Quorum: A quorum of any regular meeting or special meeting shall consist of twenty-five members.

(See page 16, 1921 proceedings.)

BY-LAWS.

*Article I*

Meetings: Sec. 1 Regular Meetings. This Association shall meet at least once each year, at such time and place as shall be designated for that purpose by the executive committee.

Sec. 2. Special Meetings. Whenever the exigency presents itself, the president of this Association may, and on request of any twenty members in writing, shall call a special meeting of the Association at a time and place to be designated by him.

Sec. 3. Notice of Meetings. The secretary shall send notices of the time so selected to each member by mail at least ten days before the date of meeting.

*Article II*

Dues: No payment of annual dues shall be required of members of this Association if the appropriation from time to time made by the legislative assembly shall be sufficient to defray the legitimate expenses of the Association, but assessments of not to exceed one dollar for each member may be made upon the resolution adopted by a majority vote at an annual meeting or at any special meeting if due notice be given in the call for such special meeting that such assessment will be proposed.

*Article III*

Duties of the Executive Committee: The executive committee shall make all necessary arrangements for the meeting of the Association, and provide in their discretion for its entertainment, prepare the programs for its proceedings, audit all bills against the Association, and the accounts of the secretary-treasurer, and perform such other duties as may be required by the Association. The executive committee shall have full power and authority in the interval between meetings of the Association to do all acts and perform all functions which the Association itself might do or perform, except that it shall have no power to amend the constitution or by-laws.

*Article IV*

Duties of the Secretary-Treasurer: The secretary-treasurer shall keep correct and full report of the proceedings of the meetings of the Association and of its executive committee and shall collect and receive all money appropriated by the state or otherwise collected on assessments of the membership, and keep true and correct account of the same, and shall pay out such moneys on the order of the executive committee from time to time and upon vouchers drawn by the president and secretary, and he shall make a full and detailed report of all receipts and disbursements accompanied by the vouchers and paid checks, to be submitted to the executive committee and to the next annual meeting after his election, and he shall file in the office of the clerk of the State Bar Board a duplicate of such itemized statement of receipts and disbursements. The secretary-treasurer shall give a surety bond in the sum of Two Thousand Dollars running to the state of North Dakota, the premium on which shall be paid by the Association. Said bond shall be conditioned for the faithful accounting by him for all funds and property which may come into his hands by virtue of his office, and for the delivery thereof to his successor at the expiration of his term of office. The secretary-treasurer shall receive as compensation for his services such sums as may be fixed or allowed from time to time by the executive committee.

(Amended 1921, page 8 as amended 1924, page 54-60.)

*Article V*

Standing Committees: There shall be appointed annually by the president immediately after his election, the following standing committees:

1. Jurisprudence and Law Reform.
2. Legal Education and Admission to the Bar.
3. Legislative Committee.

The duties of the committees shall be as follows:

1. Jurisprudence and Law Reform. The committee upon jurisprudence and law reform shall receive and consider from any member of the bar of the state at any time proposed amendments to the code, and shall at each meeting of the Association report what changes, if any, have been made by the legislature since the last meeting, and any modifications of the rules of practice that shall have been made by the supreme court and in addition to such reports shall recommend such changes in the code and in the practice as shall seem to said committee to be proper and advantageous to the end of securing a proper reform of the laws.

Three weeks prior to the date of any annual meeting it shall file with the secretary of this Association a statement of the matters upon which it will recommend legislative action, such statement to embody all proposed amendments to existing laws and all new laws recommended by such committees, and that upon filing such statement the secretary shall cause the same to be printed or typewritten and that he forthwith mail a copy thereof to each member of this Association.

2. Legal Education. The committee on legal education and admission to the bar shall confer with and recommend to the faculty of the School of Law of the State University a suitable course of study to be pursued as a qualification for admission to the bar, and shall also confer with and recommend to the supreme court a standard of education and qualification to be adhered to as a pre-requisite to admission to the bar, and shall report in regard to such matters at each meeting of the Bar Association.

3. Legislative Committee. There shall be appointed, by the president, for a term of two years a legislative committee of fifteen members of which the president of this Association shall be chairman. The duties of said committee shall be to properly formulate all propositions approved by the Association for the enactment of new laws or the alteration and amendment of existing statutes, to supervise and direct the due presentment and course in the legislature of legislative bills formulated by it at the next succeeding session of said legislature, and to use, in the name of the Association, every honorable means and influence to secure the passage and enactment into a law of the measures so introduced.

*Article VI*

Compensation: No officer other than the secretary-treasurer shall receive compensation for his services, but the expenses of the officers of the Association and the members of the executive committee who shall attend the regular or special meetings of the Association, or duly called meetings of the executive committee, shall be paid out of the

funds received from the State Bar Board as provided by law. Such payment shall be made upon the detailed statement to be rendered by each officer, or committeeman showing the actual cash expenses of attendance at each meeting or such meetings.

*Article VII*

Additional Committees: In addition to the standing committees provided by article 5 there shall be appointed by the president, with the concurrence of the executive committee, such other committees as shall be necessary from time to time to effectively accomplish the purpose for which this Association is organized and to carry out the work undertaken by the Association at its annual meeting.

(As amended 1924 pages 55-56-60-63.)

*Article VIII*

Amendments: These by-laws may be amended at any time by a majority vote of the members present and voting at any regular meeting of the Association.

(End of Constitution and By-Laws)

## EXECUTIVE COMMITTEE REPORT ADOPTED ON OCTOBER 15, 1924.

The report of the executive committee, at the October 15th, 1924, annual meeting of the State Bar Association, among other things, contained a recommendation that the activities of this Association be enlarged by the addition of the following committees to be known as sections, was adopted at pages 13, 14, and 15 of the Proceedings of the Bar Association of 1924, but the same has never been adopted as a by-law of this Association, but has been followed:

"Be It Resolved: That there be formed within said Association the following sections, viz:

"1. A criminal law section.

"2. A comparative law section.

"3. A judicial section.

"4. A legal education section.

"5. A public utilities section.

"6. A uniform and national practice section.

"7. An Americanization section.

"8. A classification and re-statement of the law section.

"9. A bench and bar ethics section.

"10. A legal aid work section.

"11. A law enforcement section.

"12. An office, printing, books and supplies section.

"13. An Internal Affairs (of Association) section.

"Each section shall meet at least once a year on seven or more days notice from the chairman of the section, and with the exception of the

section on Americanization each section shall be composed of such number of attorneys as the president of the State Bar Association shall designate, he naming the chairman and personnel of each section and the section on Americanization shall consist of one member of the Association in each county in the state, and a chairman of the committee in addition, all named by the president of the Association.

"The proceedings or any part of them of any of these sections may, in the discretion of the executive committee, be published.

"Each section must make a report at least at each annual meeting of the Association, giving in detail the work accomplished with recommendations.

"Any matters arising in the Association properly referrable to any of such sections may be referred thereto.

"Appropriations may be made from time to time by the executive committee of the Association to any section, but the financial liability of the Association to the sections shall be limited to such appropriations as may be made for them and shall cease upon payment to the treasurers of such sections or conferences of the amount so appropriated.

"The duties of each of such sections shall be such as are usual, natural and necessarily the functions of such sections.

"1. The criminal law section shall carefully consider the criminal law and procedure in this state and recommend such timely changes, codifications, etc., in the law and procedure as may be properly applicable to the State of North Dakota, to the end that the law and procedure may be improved thereby.

"2. The comparative law section shall consider the matter of laws of this state as compared with the laws of other states, foreign and domestic, and make reports when and where our laws may be improved.

"3. The judicial section consists of judges and ex-judges of courts of record in our state and nation, a part of whose duty it shall be to regain and to retain for the courts of North Dakota and the United States their time-honored eminence and position in the hearts of our people and in the estimation of the world.

"4. The legal education section shall be particularly bound to raise the standard of education and secure the highest character of applicants for admission to the Bar of North Dakota.

"5. The public utilities section shall be specially authorized to secure just and equitable rates for the public and for the public utilities operating, or to operate in North Dakota.

"6. The uniform state and national practice section shall endeavor to secure a uniform practice act for the various similar courts of the states and nation.

"The foregoing statements are not to be construed as limiting the duties of such section but only as suggestions as to the duties to be by them performed; nor does the foregoing limit the committees of which shall or may be appointed by the president of this Association."

(The motion to adopt report was carried unanimously, 1924—page 15.)

(The above Constitution and By-Laws brought down to date August 7, 1935, by L. J. Wehe, Chairman of the Committee on Constitution and By-Laws.)

PRESIDENT FOSTER: Our next report is the report of the Committee on the Unauthorized Practice of Law. Mr. John Layne is Chairman of that committee.

MR. LAYNE: Mr. President, I think probably we all of us agree that this has been one of the most interesting and instructive and successful bar meetings we have had in many years. I don't know how many probably will agree with me, but if there is any criticism on it at all, it is the way we are rushed here during the last half or quarter of a session. We ought to meet here at nine in the morning and one in the afternoon and get through a little earlier, so my suggestion would be as to the next meeting, that we have longer hours because we are crowded and try to get in too much during the last two hours. If I knew we were going to be crowded this way, this report would be only about half as long as it is. I don't know how I can cut it at this time.

## REPORT OF COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW.

To Officers and Members of the Bar Association of North Dakota:

For the annual period intervening between the meeting of the Bar Association held at Bismarck, N. Dak., on September 6 and 7, 1934, to that held on September 6 and 7, 1935, at Grand Forks, N. Dak., the above named Committee submits the following report: In its Bismarck report prepared by the Honorable Charles G. Bangert of Enderlin, then chairman of this committee, reference was made to a meeting of the Committee at Valley City on April 9, 1934, at which the Committee selected four cases developed by prior investigation, which in its opinion appeared to cover almost every phase of Unauthorized Practice; and the Committee's Attorney, S. E. Ellsworth of Jamestown, N. Dak., was instructed to at once bring action against these parties and to speed the same to prosecution and decree as early as the necessary formalities of the cases would permit. The names of the parties selected for this purpose were as follows, towit: Fred Underwood, a collector doing business at Enderlin, N. Dak.; the Merchants National Bank and Trust Company of Fargo, N. Dak.; Business Service Collection Bureau, a corporation making collections at Bismarck, N. Dak.; and J. J. Vetter, conducting a collection agency at Minot, N. Dak. During the month of April or early in May the cases were prepared, service made and at the time of the Bismarck report, were in course of prosecution to judgment. All of these actions were brought for injunction to restrain the Defendants from practicing law.

By the time that the actions were brought, pleadings served, and preliminaries disposed of, the courts with one exception had adjourned for the summer sessions; and there were no means of bringing the cases to trial immediately. One, however, that against Fred Underwood of Enderlin was tried, by stipulation, at Enderlin in July. The evidence taken was somewhat voluminous and as Judge McKenna, who tried the case, desired to give the testimony a very critical review in order to properly make his findings, it was not disposed of until after the Bismarck meeting of the State Bar Association.

During the time covered by this report the prosecutions have proceeded rapidly to trial and judgment and at this time have reached a practical conclusion. The action against the Merchants National Bank and Trust Company of Fargo was tried before Judge McKenna at Fargo commencing on October 9, 1934. It occupied in trial about three days. Numerous exhibits were introduced and at the conclusion of the trial Judge McKenna ordered elaborate briefs both of the facts introduced and of the points of law in the case. Messrs. Nilles, Oehlert & Nilles, attorneys at law, of Fargo, N. Dak., appeared for the defendant in the case and opposed learned and elaborate briefs to those of the Plaintiff. At the conclusion of the briefing the case may be said to be fairly bristling with fine points, supported on both sides by a great variety of authority. In this state it was a pioneer case and had to be worked out judicially in the new, so to speak. The Judge's Memorandum of Opinion of his decision is one hundred and twenty-six typewritten pages in length and was filed on May 13, 1935. The preparation of Findings of Facts, Conclusions of Law, and Order for Judgment was a work of considerable magnitude and the findings were not settled or the decree entered in the case until June 4, 1935.

As stated, the Underwood case was tried at Enderlin beginning on the twenty-third day of July, 1934. In this case Judge McKenna called for briefs both of the facts and points of law and filed his Memorandum Opinion, consisting of seventy typewritten pages, on February 11, 1935. The preparation of Findings of Facts, Conclusions of Law, and Order for Judgment took considerable time, but they were finally settled and a decree in favor of the Plaintiff filed and entered in the District Court on March 15, 1935. Messrs. Kvello & Adams of Lisbon, N. Dak., appeared for the Defendant in this case, and it is understood that it is not their intention to appeal.

The trial of the action of Business Service Collection Bureau occurred on January 17, 1935, Scott Cameron of Bismarck, N. Dak., appearing for the defense. Hearing occupied about two days in the trial. A Memorandum Opinion of thirty-seven typewritten pages was filed by Judge McFarland of the Fourth Judicial District April 26, 1935. The Findings of Facts and Conclusions of Law were settled and a decree in favor of the Plaintiffs entered in the District Court of Burleigh County on June 4, 1935.

The action against J. J. Vetter of Minot was placed upon the trial calendar of the District Court of the Fifth Judicial District, County of Ward, N. Dak., and was ready for trial at the March 1935 term. Before the time of trial, however, it was discovered that Vetter had left the State of North Dakota and was located in Glasgow, Montana. He stated that he had gone into another line of business and did not expect to return to North Dakota or resume business of collections at Minot or elsewhere. Investigation made by County Officers at Minot discloses that it was probably not his intention to return to the state. In this situation the case has been allowed to remain untried, but still on file, that in case Mr. Vetter changes his mind at some time in the future and returns, it may be revived against him and tried.

The four cases brought under the instructions of the Committee, have, therefore, been duly tried or otherwise adequately dis-

posed of, so there is nothing pending at this time, and the instructions given by the State Convention at the Bismarck meeting have been fully carried out.

Your Committee may add that the results of these cases have been almost entirely satisfactory to the Association's intentions. At the Bismarck meeting it was deemed especially desirable to have a definition by the courts of the practice of law, as the legislature has given no full definition and relegated the entire matter to the Courts. It was very important that this should be had and in the holdings of the Underwood case a very full and satisfactory definition is contained. In addition to this in the two other cases that have been decided other questions such as these, have been fully settled: By what department is the Practice of Law defined? Rights acquired by admission to the bar; Power of Courts in enforcing restraint of unlawful practice; the legal instruments that only a licensed lawyer may prepare; the restraint of unlicensed advice in any court; the notices that may be used and services that may be made by unlicensed persons in collection matters; the power of courts to enforce lawful practice of law; the superior quality of the business done in a lawyer's office; that corporations are not authorized to practice law even in their own suits in any court; that wills may not be drafted or outlined by any unlicensed persons; that an unlicensed person or corporation may not advertise or hold itself out as entitled to practice law; and that an executor or guardian as such, has no right to conduct probate proceedings. These, with a number of other points, are held in these cases entirely in favor of the restraint of Unlicensed Practice of Law.

In order that the hearers of this report may judge of the quality of these holdings, we are quoting conclusions from all three opinions in which the cases have been tried.

(1) By what department is practice of law defined?

"The legislature of this State, while having prohibited the unlicensed practice of law, not having attempted to define such practice, such definition must necessarily be one for judicial determination.

(2) Rights acquired by admission to the Bar:

"The practice of law, in the State of North Dakota, is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study both general and professional and a thorough examination by a State Board appointed for the purpose. The right to practice law in North Dakota is in the nature of a franchise from the state, conferred only for merit and compliance with the foregoing condition and in addition thereto the payment of an annual license fee of $10.00 and a certificate to that effect from the State Bar Board."

(3) Power of Courts in Prevention of Unlawful Practices:

"The Courts have inherent power and control over the general subject of the practice of law; and this includes the power to punish unauthorized persons for presuming to practice law without being

licensed so to do as required by law and the rules of the court. In furtherance of such powers this court is authorized to enjoin unauthorized persons from acts constituting the practice of law and to enforce such injunctions by the usual penalties."

(4) Definition of Practice of Law:

"The Practice of law, according to the laws and customs of our courts, is the giving of advice or rendition of any sort of service by any person, firm or corporation, when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill. The practice of law in this State includes the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts; and, in addition, conveyancing, the preparation of legal instruments of all kinds, and, in general, all advice to clients and all action taken on their behalf, in matters connected with the construction, enforcement or determination of the law."

(5) The legal instruments that only a licensed lawyer may prepare.

"The preparation, customarily and as a business, for others, by Defendant of the instruments specifically described as Finding II constituted, or is part of the practice of law, and, as he was not admitted to the Bar of this State or licensed to practice law, is, on his part, unlawful, and this is equally true whether such instruments were prepared by being filled out in blank or 'skeleton forms' used by Defendant for that purpose, or whether they were written out in full by him."

(6) The legal instruments referred to in this holding are described in Finding 2, as follows:

(1) Warranty deeds; (2) real estate mortgages; (3) chattel mortgages; (4) Satisfaction of real estate mortgages; (5) Releases of chattel mortgages; (6) Satisfaction of judgment; (7) conditional sales contracts; (8) affidavits of various kinds and dealing with various subjects; (9) contracts for deed; (10) house leases; (11) labor liens; (12) thresher liens; (13) mechanics liens for material; (14) mechanics liens for labor; (15) satisfaction of mechanics liens; (16) partial waivers and releases of notices of intention to file mechanics liens; (17) notices of intentions and demands before filing mechanics liens; (18) abandonment and cancellation of notices to file mechanics liens.

(7) Advice and service in actions in any Court:

"The giving of advice to another person, in an action pending in District Court and 'taking care of,' conducting, or adjusting the proceedings therein and in making a charge therefor, as described in Finding V, was the practice of law by Defendant."

(8) The preparation of any instruments requiring legal learning and skill.

"That the Plaintiffs are entitled to a Judgment and Decree of this Court permanently enjoining the Defendant, Fred Underwood, from preparing and furnishing to persons other than himself, with or without compensation therefor, any legal instrument of the description

contained in Finding 2, therefor or any other paper or instrument whose preparation requires learning and skill in the practice of law, whether filling in blank forms prepared for such purpose or written out in full by him."

(1) Power in courts to enjoin unlawful practice of law:

"That the Courts have power in equity by injunction to restrain corporations or individuals from engaging in the unlawful practice of law and may punish as for contempt any violation of its orders.

(2) As to preparing pleadings for any use in any Courts:

"That practicing law embraces the preparation of pleadings and other papers incident to actions and judicial proceedings on behalf of clients before juries or courts."

(3) Business done in lawyer's office:

"That a large portion of the ordinary business of practicing law is done in the lawyer's office and is just as vital and as highly important as that performed in the courts."

(4) As to preparing wills:

"That the drafting and supervision of the execution of wills and codicils constitutes the practice of law."

"Drafting instruments creating living trusts, testamentary trusts and insurance trusts."

"The rendering of opinions as to the validity or invalidity of a title to real or personal property."

(5) Corporations may not practice law:

"As a corporation cannot practice law directly, it cannot do so indirectly by employing competent lawyers to practice law for it."

"A corporation can never under any circumstances engage in the practice of law."

"Though all the directors and officers of a corporation be duly licensed members of the legal profession, the practice of law by the corporation would be nevertheless illegal."

"That a corporation may not advertise or hold itself out to the public as entitled to practice law or to give legal advice or to prepare legal instruments of any kind."

"That the law does not confer upon trust companies the power to draft wills, trust declarations or other instruments creating the duties which such companies are authorized to take, accept and execute."

"That an executor, administrator or guardian, as such, has no right to conduct probate proceedings."

(9) Right of corporations, collection claims, to retain attorneys for conducting and managing litigation for clients.

"That the plaintiffs herein are entitled to judgment against the defendant, permanently enjoining and restraining the defendant corporation, its officers and agents, from the practice of law in performing the act or in obligating itself to retain attorneys at law, for the purpose of instituting, conducting or managing litigation for clients and parties in interest other than itself."

(10) Right of corporations to threaten to invoke compulsory powers of State or legal action in Court in the collection of claims.

"That the plaintiffs herein are entitled to judgment against the defendant, permanently enjoining and restraining the defendant corporation, its officers and agents, from invoking or threatening to invoke compulsory powers of state or legal action in court by holding itself out as possessing, or assuming to possess, authority to practice law by representing clients or otherwise in legal matters, or by masquerading by threats or use of written instruments of like nature to those described in the evidence (exhibits 2 to 9, inclusive), pretending the form and substance of legal character and conception, or by simulating court summonses and processes (as disclosed in exhibits 10 and 13), leading or likely to lead the unsophisticated to believe that they issued under legal authority or possessed attributes of formal, official, legal authority or constituted power."

From the foregoing excerpts the legal conclusions reached by Judge McKenna and Judge McFarland sitting in the first, third and fourth districts respectively, against the Unlicensed Practice of Law, have been fully outlined. Further than this, in these districts of the state, at least, there is no question as to what constitutes the Practice of Law; and of the procedure that should be used in order to restrain practice that is unlicensed. In fact, in these districts the law is more firmly established than it would be by legislative enactment; for as it is suggested in this report the strong current of authority indicates that the proper source of most of these definitions is the Judicial Department.

And not only this, but the accomplishments of the Committee by its work during the past year have now greatly simplified the course of prosecution in the First, Third and Fourth Judicial Districts. Instead of an action in equity, with all its preliminaries to restrain the Unlicensed Practice of Law, it may be prosecuted by a summary proceeding in contempt which will reach the same result in much shorter time and with less expense. This was the course of procedure followed in the outstanding case of Illinois State Bar Association against Drovers National Bank of Chicago. In this case, the proceeding was brought direct before the Supreme Court of the State.

While much has been accomplished along the line of your Committee's instructions, in one of the cases, in that against the Merchants National Bank and Trust Company of Fargo, the result is in some respects unsuccessful and unsatisfactory. Judge McKenna, in deciding the case, held strongly with the views of the Committee in the particulars set out in this report from that case; but made certain holdings and rulings which seem to the Committee to be inconsistent with others and to threaten some of the most favorable holdings with demoralization. This action was brought principally to restrain the bank (1) from holding itself out to the public as an establishment ready, able, and willing to give advice on legal questions, and (2) from drawing legal instruments such as chattel mortgages, deeds, leases for farm property, bills of sale, executors' deeds, real estate mortgages, assignments of rent, satisfactions of judgment all in conflict with the holding of the court that "A Corporation can never under any circumstances engage in the practice of law;" and "That a corporation may not advertise or hold itself out to the public as entitled to practice law or to give legal advice or to prepare legal instruments of any kind."

The facts shown during the trial were that, for a number of years, the Bank had sent through the mails or handed out from its office to the public generally, printed pamphlets, folders, and circulars in which it outlined the preparation of wills, defined trusts, described the preparation of trust agreements, gave, at very considerable length the details of probate and administration of Estates and the legal points attending the same, from the filing of the will to the discharge of the executor and invited the public to call upon its officers for any further instruction or information that they might desire on these topics. As instances of invitations given, the following are referred to:

In a pamphlet of 31 printed pages the importance of a will to every person with title to property is set out in great length; the essentials of a valid will are mentioned in detail; the value to the heirs of testator of both Living Trusts and Life Insurance Trusts are set forth in detail. These trusts are defined and the manner in which they are created is explained; on page 28 of the pamphlet is this invitation:

"Our officers will be glad to consult with you and your insurance agent in the preparation of a plan of insurance protection that will accomplish your purposes and meet the particular needs of your family."

And on page 25 these words appear:

"The Simple Steps in Creating an Insurance Trust. A trust agreement between yourself and our organization is prepared for your signature and ours. Then your insurance policies are made payable to us, as your trustee."

And finally on page 31:

"The Officers of our Trust Department will be glad to give you further information on any of the subjects covered in this booklet and to suggest steps to be taken to meet your own particular problems."

"We invite you to call upon us."

In another folder entitled "His Will Won't Meet Today's Conditions; Will Yours?" There is a discussion of the novel and somewhat intricate conditions that have arisen at the present time with a discussion of the changes that should be made in Wills already drawn to meet these conditions, with an invitation at the close:

"We shall be glad to discuss these matters with you confidentially, giving you the benefit of our experience in handling estates and trusts. It will incur no obligation on your part."

In a folder entitled "What He Left To His Wife" there is a complete outline of duties in probating an estate of Decedent from the filing of the will to the discharge of the executor, consisting of 26 items. It is needless to say that these items include all matters of law as well as those of business on the part of executors and trustees. Following this is this invitation:

"You are invited to consult with our Trust Officers regarding the best plans for the distribution of your estate. If your Will is already drawn, you can name The Merchants National Bank and Trust Company of Fargo, as Executor, through the addition of a simple codicil."

There is no mention anywhere in this circular of the employment or services of an Attorney.

In a folder entitled "His Own Free Will" is given an imaginary conversation between a husband and his wife as to what features are desirable in a will. How a will should be drawn, witnessed, how estate property could be placed in trust and the collection and disposal of life insurance be left to a trustee. The conclusions reached in the conversation:

"A will seems to have some pretty good features in its favor that we ought to know more about."

"HE: I think I'll drop in at the bank today and ask the Trust Officer a few questions. It couldn't do any harm."

"SHE: I think that's a good idea. Probably they can tell you more about that regular income."

(THEY WERE BOTH RIGHT)"

Then follows in the folder an invitation:

"Our Trust Officer can explain the advantages of drawing a will and of how money left under a will can be protected by sound investments and provide regular income to your family. MAKE THE NEXT CONVERSATION A REAL ONE WITH OUR TRUST OFFICER."

Further than this, from the facts of the case shown upon the trial it appears that the bank caused to be prepared at its offices by its employees and attorneys the legal instruments mentioned and described above as incidental to the business of estates for which it was acting as Executor or Administrator for the business of other banks in which one or more of its officers were acting as liquidating agents; for persons indebted to debtors of the bank but not to the bank itself from whom the bank afterward took assignment as collateral to its debts; for a Loan Association running to a debtor of the bank for a loan out of which the bank expected to be paid a part of its debt.

All of these acts the Committee, through its attorneys, strongly contended upon the trial and in the briefs were Unlawful Practice of Law and should be enjoined. Judge McKenna concluded, however,

"That a Trust Company has the right to advertise its business and in that connection the fact that it is a fiduciary;" and that he could not find in any of the pamphlets, folders, or circulars distributed by it and offered in evidence any suggestion other than this.

In reference to the preparation of legal instruments the court held

"That a corporation may prepare simple instruments such as deeds, mortgages, bills of sale, etc., if they are incidental to and connected with conduct of its authorized business."

and held for the dismissal of the case without injunctional orders.

It has seemed to the Committee that this holding is inconsistent with the conclusions of the trial court that

"A corporation can never under any circumstances engage in the Practice of Law."

That if such conclusions should become the settled law of the State it would be taken advantage of by certain corporations operating within the state who would have their charters drawn as they might legitimately

do, to practice practically every line of business except the law business itself; and then would draw every kind of legal instrument claiming that it was ancillary to the business which they were authorized to do.

That the Committee, after the handing down of this decision, carefully considered the question of appeal from the holdings of Judge McKenna last set forth. In case a change in these holdings should be secured in the Supreme Court the Association would then have a strong, clear, and consistent system for prosecution of any cases of Unlicensed Practice of Law that might arise anywhere in the State which might be prosecuted in all the districts without discrimination.

After due consideration of the question of appeal, however, it appeared to a majority of the Committee that the prospects of success would not warrant the expense of appeal.

This report is submitted to the Association with a request for such further direction or recommendation for further conduct of the affairs of this Committee along such lines as may seem proper.

Dated August 27, 1935.

JOHN A. LAYNE, Chairman
C. B. CRAVEN,
ARTHUR L. KNAUF.
Members of Committee on
Unlicensed Practice of Law.

MR. LAYNE: I move, Mr. Chairman, the adoption of the report.

MR. LAMBERT: It seems to me me that this work of the committee deserves our most hearty commendation. Of course, I am very sorry to hear that last part of the report, that they would not be warranted in taking an appeal because it seems to me that part of the decision is, as read, diametrically opposed to what we are trying to do, and as long as we have started in on this thing, and that case seems to be in exact conflict with the other, the only thing seems to be to get to the Supreme Court and find out what it is. I thought everything was coming along fine. Of course, if these fellows are sure we haven't a chance, I don't suppose there is any use of going after it, on the basis of our own committee's report, but if there is reasonable expectation there would be a change in that, it would warrant an appeal. Therefore, I would modify this motion and ask to have it amended so as to say that this report be submitted to the executive committee and that if after considering the matter that this committee direct an appeal be taken, if there is even a fair chance of getting a reversal, that this be done at the expense of the bar association.

PRESIDENT FOSTER: Mr. Lambert, it is getting late this afternoon, and I would like to have you withdraw your motion and have this report filed and then make a motion that the matter be submitted to the executive committee with instructions to study this report and instruct their committee to appeal, if they deem that advisable. Wouldn't that cut us down on time a little?"

MR. LAMBERT: I think that is the effect of what I have already said.

PRESIDENT FOSTER: We will use that substitute motion. You have heard the motion, is there a second?

MR. LIBBY: I second this amended motion, but I did suppose that the problems covered by the report of the committee with reference to the cases cited there which have never gone to the Supreme Court were fairly well settled propositions of law in this state, and if there is the necessity of having this case go to the Supreme Court to have those matters determined definitely, when so many other states having the same statutes as ours have passed upon it apparently within the last year; if that is necessary, I second the amended motion.

(The motion was duly submitted and carried).

MR. ARTHUR KNAUF: Being a member of the committee, I personally felt that the advertisement in which they ask people to call and consult and then talk things over, that the very essence of "things" constitutes the practice of law, so I am probably the minority member of this committee. I have been on this committee for a long time, four or five years. Probably at my insistence, these cases have been tried and brought to trial. Now it seems to me the association should appoint some one else on that committee and relieve me from the committee, and that it should determine whether or not they want the committee continued at this time, and whether or not the committee should go on and function with full power to act in cases during the coming year. That matter ought to be determined and really relieve me from further action on the committee.

MR. LAMBERT: It seems to me as though the way my motion was put, seconded and carried would be definite enough to put the whole matter in the hands of the executive committee; so far as what might be done in the future, I didn't take it, it was a discharge of this committee.

PRESIDENT FOSTER: You understand, Mr. Lambert, these committees are appointed for one year only. There was nothing definite in your motion, as I recall it, that there even be a request to the president and incoming committee, to continue the same ones.

MR. LAMBERT: If the executive committee thinks there is a case for appeal, or think they have even a fair chance, you have got to sell yourself first before you can sell the Supreme Court, that is a cinch. I think perhaps it will be well to add this further, and I so move, that the committee that has already reported be continued in power subject to the order of the executive committee, to continue them, or to appoint some one to take their place.

MR. LAYNE: Maybe it is misleading at the last where we ask the Association to give us some instructions. I don't think any of this committee are very anxious to continue on. They would rather have some new committee appointed. Mr. Knauf says he was probably considered a minority member of the committee. We all signed the report, but I took the decision of Judge McKenna on that proposition, probably on account of having such great respect for the judge, and I thought his law, his conclusions from the evidence that was submitted, that it would not warrant the appeal because of the voluminous evidence there, and I thought possibly we would get the same results, and that is probably why Mr. Craven and I agreed, and Mr. Knauf, as he says, is the minority member of the committee. I thought we would probably get the same results. What we were attempting to do is to have these fellows who

are holding themselves out as competent to draw wills, etc., and advertising, to have them cease and stop it, and they would probably do that as they would not want the expenses involved in litigation.

As we looked over that memorandum opinion, both Mr. Craven and I were quite satisfied that it was not very broad. There was not so very much that we could appeal from and we didn't like, as a committee, to go to the expense. Now if this association—I think Mr. Lambert's motion here covers that—the new executive committee takes and reads that opinion like I read it, and then if they disagree with me, I am willing then to go ahead, or whatever happens I am willing to pay the expense. I just want to make it clear, that it is results we want here. I think Mr. Ellsworth has accomplished great results in the work he has done here, outside of just the granting of the injunction, outside of that, I think that every trust company in the state is going to pay attention, but it wouldn't cost much to appeal.

Now this is only a suggestion. We have got Judge McKenna's conclusions in the Underwood case. We have Judge McFarland's conclusions in the Bismarck case. We have got Judge McKenna's conclusions in the bank case, and I would like to take one month's issue of the Bar Briefs for instance and publish the conclusions in the Underwood case, the next month publish the conclusions in the Bismarck case and the third month publish the conclusions in the other case, so that every member of the Bar could read the conclusions that both Judges McFarland and McKenna made in these cases, and get them out in the hands of every member of the state so they could see what the district court has concluded on the unauthorized practice of law.

MR. STORMON: I fully agree with what Mr. Layne has stated. I think these opinions should be printed in the December annual number of Bar Briefs, and I would like to move the Executive Committee be instructed to have printed in our annual number the three decisions referred to so they will be available to all of the members of the Association. I understand that none of these cases have gone to the Supreme Court.

MR. LEWIS: If I understand Mr. Lambert's motion correctly, it seems to me it fully covers this matter, and I want to second the motion. It appears to me that it approves the whole report, and puts the entire matter up to the executive committee with power to appeal, if they see fit. I do not believe the Bar Association, much as it would like to, should be put to the expense of publishing 200 pages of opinion in Bar Briefs.

MR. LAYNE: I didn't mean the whole memorandum. I meant just the conclusions. Is that the motion before the house?

MR. STORMON: My only thought is to get the matter of these decisions to all of the members, and if the conclusions will cover that, why I will amend my motion to that effect.

MR. ELLSWORTH: I believe there is a way to get the same results in a much shorter way than printing this report.

MR. LAMBERT: I rise to a point of order. When we get through with the first motion, then let us discuss the matter of printing.

PRESIDENT FOSTER: I will hold that the question of printing is not in order. The question before the House is on the motion.

MR. ELLSWORTH: I want to make an amended motion. My motion is this, it is an amendment to Mr. Lambert's motion, and that is that a committee of this association be appointed by the president to be approved by the executive committee to act during the coming year, and that to this committee be submitted all procedure in connection with these cases for the prosecution of unlicensed practice of law, and that it be instructed to proceed in all particulars with efficiency, and speed.

PRESIDENT FOSTER: Mr. Lambert, do you accept the amendment?

MR. LAMBERT: I don't think I want to consent to that. Put it in the hands of the executive committee up until they see fit to change. They can do as they want to about that.

MR. ELLSWORTH: The Executive Committee has at present much more than it can look after. This committee has been acting for the last three years very efficiently.

PRESIDENT FOSTER: You are both arguing for the same thing. Mr. Lambert's motion was that this committee be continued until a new one was appointed, with power to act until a new committee is appointed.

MR. LAMBERT: Yes, and the executive board simply has the right to continue them if they want to.

MR. ELLSWORTH: The committee is appointed by the new president. I think we have no right to bind him.

PRESIDENT FOSTER: You mean the committee is to be continued, on the personnel?

MR. LAMBERT: The personnel of the committee is to be continued until a new one is apointed. It means new or different ones. (Question called for).

PRESIDENT FOSTER: Mr. Lambert's motion is the one before the House, the substance of which is that the present committee on unauthorized practice of law be continued with power to act until such time as a new committee be appointed by the president in the usual course. (Motion duly submitted and carried).

MR. LEWIS: If you will bear with me for a minute, and I think the other members agree with me, I would like to submit the report of the resolutions committee, as I must go now.

**EDITOR'S NOTE: The Executive Committee of the Association, at its meeting in September, 1935, did not pass directly upon the matter of appeal of the action brought on behalf of the State Bar Association against The Merchants National Bank and Trust Company of Fargo; but passed the matter on for further investigation and determination to the New Committee on Unlawful Practice of Law, appointed by President Hildreth.**

**The new committee decided that an appeal to the Supreme Court of this case should be taken and directed S. E. Ellsworth of Jamestown, to take further proceedings for that purpose. The appeal has been taken and counsel is now engaged in briefing the case which will doubtless be heard by the Supreme Court in January or February of next year. The grounds on which the appeal is taken are those suggested by the Committee in its report.**

## REPORT OF RESOLUTIONS COMMITTEE

We, the committee on resolutions, beg to present the following to the Bar Association:

RESOLVED, that the North Dakota Bar Association express its thanks to the Bar of Grand Forks for the splendid entertainment received, especially the splendid song and musical numbers so delightfully rendered.

A meeting of this Association would be unquestionably unconstitutional if it did not include a banquet with that dean of toastmasters, Tracy Bangs, presiding.

We appreciate Judge Birdzell's report of affairs in Washington and we enjoyed thoroughly the delightful talk of Dean Laing who has proved himself a past master of wit that contains thoughts for the edification of all hearers.

We tender our appreciation and thanks to the members of the faculty of the North Dakota Law School, who have so faithfully, as ever, cooperated with the Bar of the State.

We wish especially to thank the ladies of Grand Forks for their delightful hospitality extended to our wives and sweethearts.

We extend our thanks to Mr. Fredricks, Dr. Carr, Mr. Devitt, Mr. Glotzbach, Judge Claussen and Judge Birdzell for their able and interesting addresses.

We wish especially to thank the Hon. Bruce Sanborn for his masterly address on constitutional topics.

We extend our thanks to our members who prepared committee reports and have been responsible for much of the interesting discussion at the meeting.

We desire to express our satisfaction at one of the most interesting and successful meetings of the Bar in years and to express our thanks to President Foster and the other officers of the Association for their work which did so much to bring about this happy result, as well as for their labors during the year.

Respectfully submitted,

ALOYS WARTNER,
B. W. SHAW,
JOHN H. LEWIS.

MR. LEWIS: Mr. Chairman, I move the adoption of this report. (Motion was duly seconded, submitted and carried).

PRESIDENT FOSTER: Just at this point, let me add my personal thanks to the committee from Grand Forks. It has been a pleasure to work with them. They were energetic. They are all fine fellows. They certainly made a fine arrangement for everything down here. It could not have been a successful meeting without them. I am sure all of the members of the Association appreciate the treatment we have received.

We have, I believe next, the report of the Memorial Committee, of which Mr. Libby is chairman.

MR. LIBBY: Mr. President, and the few members of the Bar Association who have had the nerve to remain: We are pleased in some ways to make this report, pleased because of the fact that comparatively few members of our association have left us during the past twelve months. I say comparatively few, about one third of those who have left us in any one year since I have been a member of this committee, which covers a period of about 12 years, lacking one year when the Honorable Tracy Bangs, I believe, occupied the position. I tried to get the information from him today, but he was out, as to the number of deaths that year. I know nothing about that but the records of the general office in Bismarck will show that, but I wanted to tell you the exact record during the past eleven or twelve years here today; so far as my own official work is concerned, during that time I have reported on 51 deaths. Now when you consider a membership of our size in this state, that is not so very discouraging or disheartening, but there is another element that enters into this that offsets any feeling of great loss over the departure of these brother members, and that is every year the North Dakota Law School turns out more than the number that dies, so the thing is being kept up right along and the old machine is going to go right along.

Mr. President, with your permission, I don't believe I will read this report. It will be printed any way. I know your time is limited and there are other business matters to come before you, so I don't believe it is necessary to do this. I do, however, want to give you the names of the brothers who have passed on since my last report a year ago.

Frank E. Fisk who was for years on the bench out at Williston, and later practiced law continuously until his death out there, and as you all know was a brother of our old beloved, Charles E. Fisk, who was with us here for so many years.

Then we have Smith Stimmell, a very high grade lawyer, and a wonderfully fine citizen of this state, a resident of Fargo, 92 years old as the record came to me when he died, and Colonel Hildreth, I think, will remember about the number of years he lived in Fargo, something like 53 or 54 years, wasn't it?

Honorable George H. Moellring, who was a district judge out west for quite a number of years. I think he succeeded Judge Frank Fisk at Williston; served out there until his appointment to the Supreme Court of this state, where he served until his death. He was 57 years of age.

Then we have Mr. Callahan, one of the finest citizens this state ever possessed. Practiced law at Casselton for a great many years, and he was not only a good lawyer, as I think those who knew him as I have known him for years, will say, but he was one of the finest orators in the northwest. He was 75 when he died March 17, 1935.

Then Mr. Thomas Clifford of Langdon, "Tom" as we knew him, all of us in Walsh county for a number of years, was a very fine fellow, a jovial man, a highly educated man, came direct from the old school from England over here, I think, and for a time was engaged in banking and then entered the practice of law and continued his practice at Langdon for quite a number of years. I haven't his age but he was a comparatively young man.

Then William MacMurchie, I think he used to have a brother who practiced law in Grafton. William has been a resident of Pembina county all of the 54 years in which I have lived in North Dakota, I am sure of that, and he was a very fine fellow in every respect, a well informed lawyer, and served the county there on different occasions quite a number of different times as state's attorney, county attorney under the old system, and since the change, state's attorney, with some interruptions, not all the time, but a great many years he occupied that position, and gave satisfaction to the people.

Then we have V. E. Stenersen of Minot. He died very suddenly. I don't know so very much about him except that he practiced there quite a number of years. I hadn't any personal acquaintance with him but I know he was said to be a very fine young fellow.

There are eight, I believe, I said for this year.

PRESIDENT FOSTER: We have here the reports of the State Bar Board, the reports of the Committees on Ethics and Internal Affairs, and Jurisprudence and Law Reform. Mr. Newton is not here and they are quite long. The hour is getting late and we will be glad to entertain a motion that these reports be adopted, filed and printed.

MR. GREY: I so move. (The motion was duly seconded, submitted and carried.)

## REPORT OF STATE BAR BOARD

The report of this Board deals with the year from July 1st, 1934, to June 30th, 1935. During that period the board conducted one regular examination of applicants for admission to the bar. Forty-one applicants were examined and thirty-five of these were passed. Thirty-three were admitted to the bar immediately and two were recommended for admission upon meeting additional requirements prescribed by the board. These requirements having been met the candidates later were admitted. Four attorneys were admitted during the year on motion.

As is usual a number of complaints of professional misconduct on the part of members of the bar have been under consideration. The following summary shows the diversity and the number of our problems:

| | |
|---|---|
| Disbarment proceedings pending before the Supreme Court for decision | 3 |
| Disbarment proceedings pending before Referees | 2 |
| Reprimands Administered by the Supreme Court on recommendation of the board | 2 |
| Complaints dismissed | 3 |
| Investigations now in process | 2 |
| Applications of attorneys heretofore disbarred for reinstatement pending | 2 |
| Applications for admission from foreign state in process of investigation | 1 |
| Applications for nunc pro tunc filings of certificates of clerkship recommended by the board and approved by the court | 2 |
| Other license matters considered and adopted | 2 |
| Names of members of the bar stricken for non-payment of license fees | 1 |

The financial statement of the board for the fiscal year ending June 30th, 1935, differs substantially from former financial reports by reason of the fact that the assembly of 1933 authorized the use of the state bar fund to meet the expenses incurred by the State Bar Association in the conduct of investigations and the prosecution of proceedings instituted for the purpose of protecting the public and the bar against unauthorized practices by corporations or persons not licensed to practice law. Ordinarily the expenses of the board have been less than the receipts from licenses and examination fees. During the year under consideration more than the usual number of disbarment proceedings were prosecuted so that the expenses of the board for the year exceeded somewhat the amount of its receipts. The expenses of the association in dealing with the problem of the unauthorized practice of the law of course were a new outlay and as these were incurred in this fiscal year the total expense charged to the bar fund has been unusually heavy and the balance on hand on July 1st, 1935, therefore is materially less than was the balance at the beginning of the year.

It so happens that at this time no new disbarment proceedings are in prospect and we are informed by the committee on Unauthorized

Practice that in all probability it will have comparatively light expenses during the current year. It therefore is to be expected that the bar fund will show a substantial increase at the end of the present fiscal year.

The report is as follows:

| | | |
|---|---|---|
| Balance in Bar Board Fund June 30, 1934 | | $ 6,611.88 |
| Collections: June 30, 1934, to July 1st, 1935: | | |
| Licenses | $5,630.00 | |
| Examination Fees | 760.00 | |
| Total Collected | | 6,390.00 |
| Grand Total | | $13,001.88 |
| Less examination fees, not available for general disbursement | | 760.00 |
| Actual Balance derived from licenses fees | | $12,441.88 |
| Disbursements | | 8,796.43 |
| Balance | | $ 3,445.45 |
| Less amount due State Bar Association for period covered by this report, but not yet vouchered, 169 licenses at $5.00 each | | 945.00 |
| Actual balance on hand for disbursement under the provisions of licensing act | | $ 2,500.45 |

*Distribution of Disbursements:*

| | |
|---|---|
| State Bar Association | $2,325.00 |
| Salary and Expense of Secretary | 314.56 |
| Per diems and expense members State Bar Board | 681.73 |
| Attorneys' Fees and Expenses Disbarment Proceedings | 2,432.64 |
| Postage | 107.46 |
| Supplies | 87.18 |
| Printing | 148.77 |
| Clerk Hire, Secretary and Members of Bar Board | 225.00 |
| Miscellaneous | 18.50 |
| Expenses, Lawyer Members of Judicial Council | 71.55 |
| To Committee on Unlawful Practice | 2,301.84 |
| Furniture and Fixtures | 82.20 |
| Total | $8,796.43 |

Respectfully Submitted:

C. L. YOUNG, President
J. P. CAIN
C. J. MURPHY

## REPORT OF COMMITTEE ON ETHICS AND INTERNAL AFFAIRS

The association year has been notable by virtue of the fact that scarcely any complaints have been made against members of the bar. Two or three rather trifling matters found their way to the chairman of the committee but before it was necessary for the committee to consider them the causes of complaint were removed and the committee was relieved of further responsibility.

There is one matter now pending which we believe will be adjusted to the satisfaction of all concerned before the new committee is appointed.

Respectfully Submitted:

C. L. YOUNG, Chairman.

## REPORT OF COMMITTEE ON JURISPRUDENCE AND LAW REFORM

of the State Bar Association of North Dakota

Your committee respectfully requests that the Bar Association give consideration to the following:

I.

The practice of interposing sham answers, verified on information and belief by the attorney of record, which are withdrawn upon the call of the calendar just as soon as a jury term of court arrives, is growing, and puts the lawyer in a rather unenviable light with the laymen who understand the practice.

Your committee believes that the situation might be improved by having a law passed, making it possible to dispose of such answers on motion without waiting until a term of court arrives.

Your committee therefore recommends that a committee of the Bar Association be appointed to study the advisability of presenting to the Twenty-fifth Session of the Legislative Assembly a bill to the effect that where such answers are interposed the court may on motion based on the affidavit of the plaintiff or someone for him familiar with the facts, to the effect that the answer is sham, require the defendant to verify the same positively, and if the defendant refuses to do so authorize the court to strike the answer, with the same force and effect as if no answer had ever been served.

II.

The statutes of North Dakota are distributed throughout the 1913 Compiled Laws, the 1925 Supplement and five volumes of Session Laws. Since the publication of the Supplement we have had approximately one thousand changes in the law of this state through the enactment of new laws, amendments, and repeals. The complicated search necessary to determine what laws are now in force results not only in confusion but in many instances causes unnecessary and expensive litigation. Your committee believes that the situation may be materially improved by either a new compilation or a codification of the statutes. We, therefore, recommend that a committee of the Bar Association be appointed

to study the advisability of proposing to the Twenty-fifth Session of the Legislative Assembly a plan for either compilation or codification of the statutes and that such committees report its plan to the next regular meeting of this association for further consideration.

III.

Several preceding committees on Jurisprudence and Law Reform have warned the profession against the tendency of vesting in administrative officers and boards the power to render final decisions involving substantial individual and property rights. We agree with our predecessors in that regard and recommend that where such rights are involved, that no further grant of such power be made without providing for judicial review.

JAMES MORRIS
H. YOUNG
T. A. TONER

RESOLUTION

WHEREAS, Many of the states have realized that a proper exercise of the rule-making power of the courts governing practice and procedure, might be of advantage and have adopted such rules, and

WHEREAS, the whole subject has been investigated by the Judicial Councils of many of the states;

NOW, THEREFORE, BE IT RESOLVED, That this Association request the Judicial Council of the State of North Dakota to investigate the feasibility of the adoption of rules of practice and procedure under the rule-making power of the courts.

REPORT OF FEE SCHEDULES COMMITTEE

Only one matter has been referred to the committee. That was by the secretary's letter of April 2nd, 1935, wherein this committee was asked to answer an inquiry as to whether the State Bar Association has established any minimum fee to be charged for drawing and procuring an order of the district court authorizing the sheriff to issue a sheriff's deed. The reply to that inquiry was:

"The Fee Schedule established by the State Bar Association does not cover the item mentioned. The necessity of obtaining an order of the district court authorizing a sheriff to issue a sheriff's deed was not contemplated at the time the fee schedule was adopted. That sort of procedure is an outgrowth of the Moratorium declarations of the various governors. What a reasonable fee would be for such service would depend entirely upon the circumstances of the particular case."

We do not deem it worth while to make any recommendation on a fee schedule for such proceeding.

We have no other recommendations to make as to any changes in or additions to the present adopted fee schedule. It is probably as fairly a minimum standard of fees as can be devised, and in our opinion it might as well stand just as it is.

FRED J. TRAYNOR, Chairman.

PRESIDENT FOSTER: Any other reports here that have not been filed or heard?

I think, gentlemen, that practically concludes the business of this session. I want to again express my appreciation for having been able to be president of this association for one year. I hope you have all enjoyed the meeting. I know we will have another good meeting next year.

MR. LUNDBERG: Perhaps I did not understand you, but I would like to throw myself upon your mercy and ask whether the report of the Legislative Committee has been made.

PRESIDENT FOSTER: There is no report filed for the Legislative Committee.

MR. LUNDBERG: I was waiting until it came up with a view to making a motion, and I wonder whether I may still make it.

PRESIDENT FOSTER: You may.

MR. LUNDBERG: It is to this effect, that the legislative committee be continued, and be instructed to consider ways and means as to how the laws of the state may be made so adequate as to obviate the apparent necessity of executive interference with the administration of law in the name of an emergency. (Motion seconded.)

PRESIDENT FOSTER: I don't believe the motion needs much discussion, unless somebody wants to discuss it. (Motion duly submitted and carried.) I will ask the secretary to print it with big headlines in the Bar Briefs so that it will be called to their attention.

PRESIDENT FOSTER: I think at this time a motion to adjourn will be in order.

MR. LAMBERT: I move that we adjourn. (Motion duly seconded, put and carried.)

Adjournment sine die.

# In Memoriam